# CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~907~~ ~~450~~ 133.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE UNION PACIFIC RAILWAY COMPANY ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED FEBRUARY 20, 1896.

(16197.)

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THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE UNION PACIFIC RAILWAY COMPANY ET AL.

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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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1 United States circuit court of appeals, eighth circuit.

In error to the circuit court of the United States for the district of Kansas.

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| THE UNITED STATES OF AMERICA, PLAINTIFF IN error,<br>*vs.*<br>UNION PACIFIC RAILWAY CO., AND S. S. H. Clarke, Oliver W. Mink, E. Ellery Anderson, F. R. Coudert, and John W. Doane, as receivers of Union Pacific Railway Co., defendants in error. | No. 652. December term, A. D. 1895. |

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on this 17th day of February, A. D. 1896, hereby certifies that upon the record on file in said court in the above-entitled case, wherein the United States of America is plaintiff in error and the Union Pacific Railway Company and the other defendants above-named are defendants in error, and which cause is now pending before this court upon a writ of error duly issued to the circuit court of the United States for the district of Kansas, the following facts are made to appear and do so appear, to wit:

That on January 31, 1894, there was filed by the United States of America in said circuit court of the United States for the district of Kansas against the Union Pacific Railway Company and others a petition, which (omitting the third cause of action therein stated) was in the words and figures following, to wit:

In the circuit court of the United States for the district of Kansas, first division.

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| THE UNITED STATES OF AMERICA, PLAINTIFF,<br>*vs.*<br>THE UNION PACIFIC RAILWAY COMPANY AND S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, F. R. Coudert, and John W. Doane, as receivers of the Union Pacific Railway Company, defendants. | |

2 *Petition.*

Come now the United States of America, by Richard Olney, Attorney-General of the United States, and W. C. Perry, United States attorney for the district of Kansas, and say that the above-named defendant, The Union Pacific Railway Company, is a corporation duly organized and existing under and by virtue of the laws of the United States; that S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, F. R. Coudert, and John W. Doane are the duly appointed and acting Receivers of the said Union Pacific Railway Company, and that the matter in dispute herein exceeds the sum or value of ten thousand dollars, exclusive of interest and costs, and for a first cause of action against said defendants, state:

That in the year one thousand eight hundred and thirty-one, and for a long time prior thereto, plaintiffs were the owners in fee simple of all the

lands lying north of the Kansas and west of the Missouri rivers, in the then Territory of Kansas. That by the terms of a treaty made by and between said plaintiffs and the Delaware Nation of Indians, proclaimed on the 24th day of March, 1831, the said plaintiffs conveyed and secured to the said Del'ware Nation of Indians, as a permanent home for said nation, the country in the fork of the Kansas and Missouri rivers, extending up the Kansas River to the Kansas line and up the Missouri River to Camp Leavenworth, and thence by a line drawn westwardly, leaving a space ten miles wide north of the Kansas boundary line for an outlet. That afterwards, in the year 1854, by the terms of a treaty by and between said plaintiffs and the said Delaware Nation of Indians, the said Delaware Nation of Indians ceded to said plaintiffs all their right, title, and interest in and to their country lying west of the State of Missouri, and situate in the fork of the Missouri and Kansas rivers, and also their right and interest in and to the outlet mentioned in the treaty hereinbefore set forth, excepting that portion of said country sold to the Wyandotte tribe of Indians by instruments sanctioned by an act of Congress approved July 25, 1848, and also excepting that part of said country lying east and south of a line beginning at a point on a line between the land of the Delawares and half-breed Kansas forty miles in a direct line west of the boundary between the Delawares and Wyandottes; thence north ten miles; thence in an easterly course to a point on the south bank of Big Island Creek, which shall also be on the bank of the Missouri River where the usual high-water line of said creek intersects the high-water line of said river.

That said plaintiff further avers that said treaty, among other things, provided as follows:

Article 11. "At any time hereafter, when the Delawares desire it and at their request and expense, the President may cause the country reserved for their permanent home to be surveyed in the same manner as the ceded country is surveyed, and may assign such portion to each person or family as shall be designated by the principal men of the tribe; provided, such assignment shall be uniform."

Article 12. "In the settlement of the country adjacent to the Delaware reservation, roads and highways will become necessary, and it is agreed that all roads and highways laid out by authority of law shall have a right of way through the reserved lands, on the same terms that the law provides for their location through the lands of citizens of the United States; and railroad companies, when the lines of their roads necessarily pass through the said reservation, shall have a right of way, on payment of a just compensation therefor in money."

That afterwards, as provided for in said treaty, the said Delaware Nation of Indians represented to plaintiffs that it was their wish that a portion of the lands reserved for their home might be divided among them in the manner contemplated by the 11th article of said treaty, as hereinbefore set forth, and thereupon, by the terms of a treaty made and entered into between said plaintiffs and the said Delaware Nation of Indians, concluded May 30th, 1860, it was provided, among other things, as follows:

3 "The Delawares having represented to the Government that it is their wish that a portion of the lands reserved for their home may be divided among them in the manner contemplated by the 11th

article of the treaty aforesaid, it is hereby agreed by the parties hereto that the said reservation shall be surveyed as early as practicable after the ratification of these articles of agreement and convention, in the same manner as the public lands are surveyed, and to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres, to include in every case, as far as practicable, a reasonable portion of timber, to be selected according to the legal subdivisions of survey."

Said treaty further provides by the last clause of section 2 thereof that

"The improvements of Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building their homes for them on the lands retained."

It was further provided in article 3 of said treaty that as to the remaining lands, after the tracts in severalty and those tracts for special objects names in said treaty had been selected and set apart, that the Leavenworth, Pawnee and Western Railroad Company, a corporation then organized and existing under and by virtue of the laws of the Territory of Kansas, should have the prior right of purchase upon the payment into the United States Treasury of the sum therein provided, which payment it was provided by said treaty should be made within six months after the quantity of said land was ascertained, in gold or silver coin, of such a sum as three commissioners, to be appointed by the Secretary of the Interior, should appraise to be the value, and providing that such value should not be placed below the value of one dollar and twenty-five cents per acre, exclusive of the cost of survey. It was further provided in article 3 of said treaty that the United States would issue a patent in fee simple directly to said company upon the payment as provided in said treaty, and the said article three further provides:

"It is therefore agreed by the United States that the wishes of the Delawares shall be granted; that they will accept the trust reposed upon them, and that the money resulting from such disposition of the lands shall be disposed of and applied in the manner provided for by the 7th and 8th articles of the Delaware treaty of sixth May, one thousand eight hundred and fifty-four, after expending a sufficient sum to enable them to commence agricultural pursuits under favorable circumstances. It is also agreed that said railroad company shall have a perpetual right of way over any portion of the lands allotted to the Delawares in severalty on the payment of a just compensation therefor, in money to the respective parties whose lands are crossed by the line of railroad."

By the terms of said treaty these plaintiffs became and were and still are the trustees of said Delawares for all of the purposes therein provided. That the said Leavenworth, Pawnee and Western Railroad Company prior to the year 1867 accepted the terms of said treaty and agreed to purchase the unallotted lands of said Delawares and to pay for said lands and the improvements thereon under and in accordance with the provisions and terms set forth in said treaty, and all of the rights of said railroad company in and to said lands and its liability for said lands and said improvements, and all the rights and liability of its grantee, successors, and assignee, the said defendant, The Union Pacific Railway Company, were fixed by the terms of said treaties, and the said Leavenworth, Pawnee and Western Railroad Company, and its grantee, successor, and

assignee, the defendant, The Union Pacific Railway Company, took said lands subject to the conditions set forth in said treaties as to the payment therefor and as to the payment for said improvements thereon. That, as provided in article 3 of said treaty, plaintiffs herein, on the 20th day of October, 1860, appointed three commissioners to inspect and appraise the value of all the lands and improvements which the said Leavenworth, Pawnee and Western Railroad Company had by the terms of said treaty become entitled to purchase, and said commissioners so appointed under the provisions of said treaty appraised such improvements then
4 known at the sum or value of nine thousand five hundred and thirty-four dollars and twenty-five cents, which appraisement was returned on or about the 23rd day of February, 1861, and plaintiffs say that a schedule of said appraisement, showing the improvements with their location and the value thereof, is set forth in page numbered one (1) of Exhibit A, attached to this petition, which is hereby made a part hereof, and to which reference is hereby made, to be read here the same as if fully set forth herein. And plaintiffs say that at the time of said appraisement of said improvements, and at the time of the said purchase of said land by the Leavenworth, Pawnee and Western Railroad Company, there were then other improvements on said land not included in said appraisement, but which afterward, on or about the day of , 18 , were appraised as provided in the last clause of art. 2 of said treaty of May 30th, 1860, at the sum of eleven hundred eighty-one and 50/100 dollars. An itemized statement of said improvements which are not included in said first appraisement is set forth on pages marked C of Exhibit A which are hereby made a part hereof.

And plaintiffs further say that the said Leavenworth, Pawnee and Western Railroad Company was unable to carry out the terms of the purchase of said lands and said improvements as provided in the treaties hereinbefore set forth, to pay for the same in gold and silver coin as in said treaty provided, and that afterwards a further treaty was made and entered into by and between plaintiffs and the said Delaware Nation of Indians on or about July 2, 1861, and ratified August 6th, 1861, and which in terms referred to the provisions of said sale of lands and improvements in the treaties hereinbefore set forth, by which last-mentioned treaty it was provided that said Leavenworth, Pawnee and Western Railroad Company might execute its bonds with interest warrants or coupons attached according to the forms in said last-named treaty provided, the principal sum of said bonds to be in the aggregate $286,742.15, and to execute a mortgage upon one hundred thousand (100,000) acres of land contemplated in and by said treaty as set forth in a letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated May 29th, 1861, said mortgage to be conditioned for the payment of said bonds, both principal and interest, said bonds and said mortgage being executed by said railroad company in lieu of said gold and silver coin, for the reason as set forth in said treaty, that said railroad company was not able to pay said sum of money within the time as provided therein; but no provision was made in said last-mentioned treaty for any change in the time or manner of the payment for said improvements as herein set forth, and the said bonds and mortgage were made, executed, and delivered to secure the payment of the purchase price of said lands only

exclusive of the value of said improvements, and the amount provided for and included in said mortgage did not cover or include said improvements.

That afterward, through changes in the name of the said Leavenworth, Pawnee and Western Railroad Company, and through a consolidation by and with other railroad companies, the defendant, The Union Pacific Railway Company, succeeded to all the franchises, property rights, and interests of the said Leavenworth, Pawnee and Western Railroad Company and became and is subject to all the liabilities of said company under and by virtue of the said several treaties, and under and by virtue of the purchase of the said Delaware Indian lands and the improvements thereon as hereinbefore set forth. That thereafter, by the terms of a treaty entered into on the 4th day of July, 1866, which treaty was ratified on or about the 26th day of July, 1866, in article first thereof, it was provided

"That the United States shall secure and cause to be paid to the said Indians the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee and Western Railroad Company, according to the terms of a treaty ratified August 22nd, 1860, and supplemental treaties, and in accordance with the conditions, restrictions, and limitations thereof."

Plaintiffs further say that by the terms of said treaty they became and were sureties for the payment of the value of said improvements, and that by the provisions of the treaties hereinbefore set forth and referred to said plaintiffs were and are the trustees for said Delaware Indians to collect and dispose of said money as provided in said treaties.

5 And these plaintiffs further say that neither said Leavenworth, Pawnee and Western Railroad Company, nor any of its assignees or successors, nor the Union Pacific Railway Company, nor the receivers, the defendants herein, have paid for any of said improvements on said lands as hereinbefore set forth, and that the same remains due and wholly unpaid so far as said Leavenworth, Pawnee and Western Railroad Company, its successors and assigns, and the said Union Pacific Railroad Company, and the other defendants, the said receivers, are concerned.

And these plaintiffs further say that by an act of Congress duly passed and approved on July 13th, 1892, there was appropriated and paid to said Delaware Indians the sum of $10,715.75, which sum these plaintiffs paid to said Delaware Indians as surety under the provisions of said treaties as hereinbefore set forth, and in discharge of its trust created in and by said several treaties with said Delaware Indians as hereinbefore set forth.

And these plaintiffs further say that by the terms of said treaties and by the acceptance thereof by the said Leavenworth, Pawnee and Western Railroad Company and its grantee successor and assignee, the defendant, the Union Pacific Railway Company, the said defendant, the Union Pacific Railway Company, became and is liable to these plaintiffs as said sureties and trustee for money paid out and expended on behalf of said defendants for said improvements as hereinbefore set forth and described in the said sum of $10,715.75, which sum, together with interest thereon at seven per cent from the 30th day of May, 1860, is now due and is wholly unpaid.

II. Plaintiffs for a second cause of action against the defendants state that by the terms of a treaty by and between these plaintiffs and the

Delaware Nation of Indians in the year 1854 and subsequent treaties, as set out in plaintiffs' first cause of action herein, to which reference is made, and the allegations therein as to said treaties are hereby made a part hereof, the same as if fully set forth herein, the said Leavenworth, Pawnee and Western Railroad Company became and was entitled to a right of way across the reservation of said Delaware Indians in the then Territory of Kansas, and across the lands subsequently allotted in severalty to said Delawares, upon the payment of a just compensation therefor for said right of way.

And these plaintiffs further say that by the provisions of said treaties plaintiffs became, and still are, the trustee for said Delaware Indians to collect the purchase price for their lands sold under the provisions of said treaties, and to collect and pay out in accordance with the provisions of said treaties the amount due and owing for the right of way from said railroad company; and by the provisions of the treaty of 1866, by the first article thereof, as set out in plaintiffs' first cause of action, which allegation in said first cause of action as to said treaty is hereby made a part hereof, these plaintiffs became and are sureties of the Leavenworth, Pawnee and Western Railroad Company and their successor and assign, the defendant herein, the Union Pacific Railway Company, for the payment of the amount due and owing for said right of way.

Plaintiffs further say that the said Leavenworth, Pawnee and Western Railroad Company, in pursuance of the provisions of said treaty and under and by virtue of the authority thereof, and subject to the liabilities and conditions therein provided, did select and lay out a right of way and construct a railroad thereon over and across the reservation of said Delaware Indians and over and across certain pieces and parcels of lands allotted in severalty to said Indians, as hereinbefore set forth, and under and by virtue of the provisions of said treaty said Leavenworth, Pawnee and Western Railroad Company became and was liable to these plaintiffs as trustees of said Delaware Indians for the damages to said lands and to said Indians by reason of said right of way.

And these plaintiffs say that the lands allotted in severalty that were crossed by said right of way, with the items of damage thereto and the amount of land taken in each several parcel or tract of land so crossed by said right of way, with the names of the allottees of said land, is set out in pages numbered consecutively from two to forty of Exhibit A, attached hereto, which are hereby made a part hereof.

6 These plaintiffs say that the reasonable damages by reason of said right of way across said allotted lands, as hereinbefore stated, and a reasonable compensation therefor was and is the sum of $28,959.41; that the value of said lands so taken by said right of way by the said Leavenworth, Pawnee and Western Railroad Company with damages said Delaware Indians by reason thereof was duly appraised by a commission duly appointed by the plaintiff herein as provided in said treaties. A copy or schedule of said appraisement is hereto attached as a part of Exhibit A, being pages marked 2 to 40, consecutively, of said Exhibit A, which are hereby made a part hereof and to which reference is made to be read here. That afterwards, through changes in the names of the said Leavenworth, Pawnee and Western Railroad Company, and through a consolidation by and with other railroad companies, the defendant, The Union Pacific Railway Company, succeeded to all the franchises, property,

rights, and interests of the said Leavenworth, Pawnee and Western Railroad Company, and became and is subject to all the liabilities of said company under and by virtue of the said several treaties and under and by virtue of the purchase of the said Delaware Indian lands and the improvements thereon as hereinbefore set forth; that neither of the said defendants has ever paid the said Delaware Indians or to these plaintiffs the amount due for said right of way; that by reason of the terms of said treaties and by reason of the trust there imposed on and accepted by plaintiffs, and by reason of the acceptance of said terms by the said Leavenworth, Pawnee and Western Railroad Company and by its successor, grantee, and assignee, the defendant, The Union Pacific Railway Company, the said defendant became and is still liable to these plaintiffs for said right of way and the damages growing out thereof.

And these plaintiffs say that by the provisions of the act of Congress passed and approved July 13th, 1892, plaintiffs appropriated and paid out to said Indians the sum of $28,959.41 for said right of way for and on behalf of the defendant, The Union Pacific Railway Company, and in accordance with the provisions of article one of the treaty of July 4th, 1866, by and between the said Delaware Indians and these plaintiffs, whereby these plaintiffs became and were sureties for the payment of the amount due and owing from the defendant, The Union Pacific Railway Company, as compensation for said right of way and the damages growing out thereof, by all of which the said defendant, The Union Pacific Railway Company, became and is indebted to these plaintiffs in the said sum of $28,959.41, with interest at the rate of seven per cent from January 1st, 1863, which sum is now due from said defendant to these plaintiffs and is wholly unpaid.

* * * * * * *

Wherefore, plaintiff prays for judgment against said defendants in the sum of $39,675.16, with interest thereon from January 1st, 1860, and for costs of suit.

RICHARD OLNEY,
*Attorney-General.*

W. C. PERRY,
*United States Attorney.*

Thereafter, on the 27th day of November, 1894, the Union Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, filed demurrers to said petition, which demurrers were in the words and figures following, to wit:

7 *Demurrer.*

THE UNITED STATES OF AMERICA, PLAINTIFF
*vs.*
THE UNION PACIFIC RAILWAY COMPANY AND S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, AND F. R. COUDERT, AS RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY, DEFENDANTS.

1. Now comes the said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. E. Doane, and F. R. Coudert, as receivers of the Union

Pacific Railway Company, and demur to the first cause of action set forth in plaintiff's petition herein, for the reason that the same does not state facts sufficient to constitute a cause of action against said defendants and in favor of said plaintiff.

2. Said receivers of the Union Pacific Railway Company demur to the second cause of action set forth in plaintiff's petition, for the reason that the same does not state facts sufficient to constitute a cause of action against the said receivers and in favor of said plaintiff.

* * * * * * *

A. L. WILLIAMS,
N. H. LOOMIS, and
R. W. BLAIR,
*Attorneys for Receivers of Union Pacific Railway Company, Defendants.*

* * * * * * *

*Demurrer.*

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
THE UNION PACIFIC RAILWAY COMPANY AND S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, defendants.

1. Now comes the Union Pacific Railway Company, one of the defendants above named and demurs to the first cause of action set forth in plaintiff's petition herein, for the reason that the same does not state facts sufficient to constitute a cause of action against the said defendant and in favor of said plaintiff.

2. Said defendant, The Union Pacific Railway Company, demurs to the second cause of action set forth in plaintiff's petition herein, for the reason that the same does not state facts sufficient to constitute a cause of action against the said defendant and in favor of the said plaintiff.

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A. L. WILLIAMS,
N. H. LOOMIS, and
R. W. BLAIR,
*Attorneys for Union Pacific Railway Company, Defendant.*

* * * * * * *

8 The said demurrers to said petition were thereafter, on the 22nd day of February, 1895, sustained by the circuit court of the United States for the district of Kansas, and said court thereupon ordered that said petition be dismissed and that the defendants go hence without day.

And said circuit court of appeals for the eighth circuit further certifies that said court desires the instruction of the Supreme Court of the United States upon the following questions and propositions of law arising upon the record in such cause, to the end that it may properly decide said cause.

Questions:

First. Upon the facts stated in the first and second counts of said petition, is the United States entitled to recover from the Union Pacific Railway Company, or the receivers thereof, the whole or any part of the sum of $10,715.75, heretofore paid by the United States to the Delaware Indians, pursuant to the act of Congress of July 13, 1892 (27 Stat., c. 164, page 126), for improvements upon lands sold to the Leavenworth, Pawnee & Western Railway Company?

Second. Upon the facts stated in the first and second counts of said petition, is the United States entitled to recover from the Union Pacific Railway Company, or the receivers thereof, the whole or any part of the sum of $28,954.41, heretofore paid by the United States to individual members of the tribe of Delaware Indians, pursuant to the provisions of the act of Congress of July 13, 1892, for and on account of right of way through allotted lands belonging to members of said tribe, which right of way was secured by the Leavenworth, Pawnee & Western Railroad Company, in accordance with the concluding clause of article 3 of a treaty concluded with the tribe of Delaware Indians on May 30, 1860?

Third. Upon the facts stated in the first and second counts of said petition, were the demurrers thereto properly sustained?

In witness whereof the undersigned judges, holding said United States circuit court of appeals for said eighth circuit, have hereunto set their hands this 17th day of February, A. D. 1896, at St. Louis, Missouri, and ordered and directed that the foregoing certificate be filed in said
9 circuit court of appeals, and by the clerk of said court duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
AMOS M. THAYER,
*Circuit Judges.*

10 UNITED STATES OF AMERICA,
*Eighth Circuit, ss:*

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of the United States of America, plaintiff in error, vs. The Union Pacific Railway Company, and S. H. Clark, Oliver W. Mink, E. Ellery Anderson, F. R. Coudert, and John W. Doane, as receivers of the Union Pacific Railway Company, defendants in error, was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

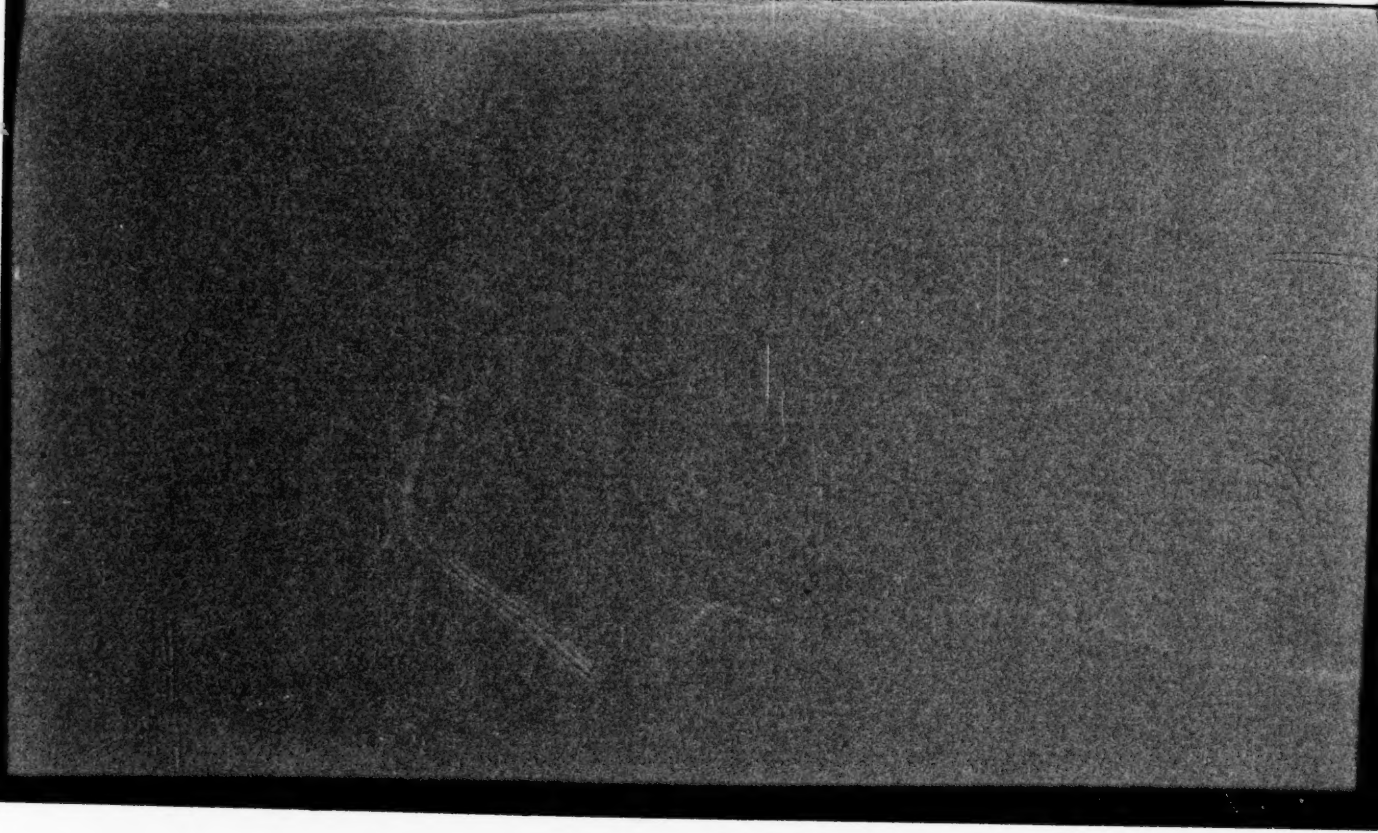
In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, this 17th day of February, A. D. 1896.

[SEAL.] JOHN D. JORDAN,
*Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.*

(Indorsed:) Original. U. S. circuit court of appeals, eighth circuit. December term, 1895. No. 652. The United States of America, plain-

tiff in error, vs. Union Pacific Railway Company et al. Certificate of questions to the Supreme Court of the United States. Filed Feb. 17, 1896. John D. Jordan, clerk.

(Indorsement on cover:) Case No. 16197. Term No., 907. The United States, plaintiff in error, vs. The Union Pacific Railway Company et al. U. S. circuit court of appeals, eighth circuit. (Certificate.) Filed February 20th, 1896.



# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

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| THE UNITED STATES, PLAINTIFF IN ERROR, v. THE UNION PACIFIC RAILWAY COMPANY et al. | No. 133. |

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

This case comes into this court on a certificate for instructions from the circuit court of appeals for the eighth circuit. The original suit, brought by the Government against the Union Pacific Railway Company and its receivers, was instituted in pursuance of the following provisions of the act of July 13, 1892, making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes (27 Stat., 126):

> The sum of thirty-nine thousand and six hundred and seventy-five dollars and sixteen cents, of which ten thousand seven hundred and fifteen dollars and

seventy-five cents shall be paid to individual members of the said tribe for improvements upon lands sold to the Leavenworth, Pawnee and Western Railroad Company under the provisions of the treaty with the Delaware tribe of Indians of date May thirtieth, eighteen hundred and sixty, in accordance with the concluding paragraph of article two of said treaty, and twenty-eight thousand nine hundred and fifty-nine dollars and forty-one cents shall be paid to the individual members of said tribe through whose allotted lands the said Leavenworth, Pawnee and Western Railroad Company secured right of way, in accordance with the concluding clause of article three of said treaty of May thirtieth, eighteen hundred and sixty: *Provided*, That the amount to be paid each member of said tribe claiming indemnity for improvements taken and damages on account of right of way of said railroad company through the allotted lands shall be determined by the Commissioner of Indian Affairs and approved by the Secretary of the Interior. And the Attorney-General is hereby authorized and directed to institute the necessary legal proceedings against the Leavenworth, Pawnee and Western Railroad Company, its successors or assigns, for recovery of the amounts heretofore found by the Department of the Interior to be due from said railroad company, its successors or assigns, under the last paragraph of the second article of the treaty with the Delaware tribe of Indians of May thirtieth, eighteen hundred and sixty, and under the concluding clause of the third article of said treaty, and for damage done the said Indians in the taking and destruction of the property by said railroad company, which sums when recovered shall be used to reimburse the United States for the sum appropriated in the foregoing paragraph.

The petition contained three causes of action or counts. The third count was dismissed in the circuit court; demurrers to the first and second were sustained. The first seeks to recover the value of the improvements upon lands sold to the railway company by the Delawares; the second, the value of the right of way through allotted lands of the Delawares. The questions submitted are, whether the United States is entitled to recover the amounts claimed in the first and second counts, and whether the demurrers to these counts were properly sustained.

Concisely stated, the facts contained in the first and second counts are as follows:

PETITION.

*First cause of action.*

In 1831 the United States owned the lands lying north of the Kansas and west of the Missouri River, in the then Territory of Kansas. By a treaty between the United States and the Delaware Nation of Indians, proclaimed March 24, 1831, the United States conveyed to the Delaware Nation, as a permanent home, the country in the fork of the Kansas and Missouri rivers, extending up the Kansas River to the Kansas line, and up the Missouri River to Camp Leavenworth, and thence by a line drawn westwardly, leaving a space 10 miles wide north of the Kansas boundary line for an outlet.

In 1854, by a subsequent treaty between the same parties, the Delawares ceded to the United States all their right, title, and interest in and to the country lying

west of the State of Missouri and situate in the fork of the Missouri and Kansas rivers, and also their right and interest in and to the outlet mentioned, excepting that portion of said country sold to the Wyandotte tribe under sanction of an act of Congress approved July 25, 1848, and also excepting that part of said country lying east and south of a line beginning at a point on the line between the land of the Delawares and half-breed Kansas, 40 miles in a direct line west of the boundary between the Delawares and Wyandottes; thence north 10 miles; thence in an easterly course to a point on the south bank of Big Island Creek, which shall also be on the bank of the Missouri River where the usual high-water line of said creek intersects the high-water line of said river. This treaty provided, among other things—

> ARTICLE XI. At any time hereafter, when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their permanent home to be surveyed in the same manner as the ceded country was surveyed, and may assign such portion to each person or family as shall be designated by the principal men of the tribe, provided such assignment shall be uniform.
>
> ARTICLE XII. In the settlement of the country adjacent to the Delaware Reservation roads and highways will become necessary, and it is agreed that all roads and highways laid out by authority of law shall have a right of way through the reserved lands on the same terms that the law provides for their location through the lands of citizens of the United States; and railroad companies, when the lines of their roads necessarily pass through the said reservation, shall have a right of way on payment of a just compensation therefor in money.

By the treaty of May 30, 1860, between the same parties, it was provided that a portion of the land reserved for the Delawares should be allotted, as contemplated by the eleventh article of the treaty of 1854. It was also provided in the last clause of section 2 of the treaty of May 30, 1860, that—

> The improvements of Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building their homes for them on the lands retained.

It was further provided in Article III of this treaty that, after the tracts in severalty and for special objects had been set apart, the Leavenworth, Pawnee and Western Railroad Company, a corporation existing under the laws of the Territory of Kansas, should have the prior right of purchase of the remaining land reserved for the Delawares, upon payment into the United States Treasury, in gold or silver coin, of a sum to be ascertained by the appraisement of three commissioners, appointed by the Secretary of the Interior, the lands not to be valued below $1.25 per acre, exclusive of the cost of survey. Article III also provided:

> It is therefore agreed by the United States that the wishes of the Delawares shall be granted; that they will accept the trust imposed upon them, and that the money resulting from such disposition of the lands shall be disposed of and applied in the manner provided for by the seventh and eighth articles of the Delaware treaty of sixth May, one thousand eight hundred and fifty-four, after expend-

ing a sufficient sum to commence agricultural pursuits under favorable circumstances. It is also agreed that said railroad company shall have a perpetual right of way over any portion of the lands allotted to the Delawares in severalty on the payment of a just compensation therefor in money to the respective parties whose lands are crossed by the line of railroad.

The Leavenworth, Pawnee and Western Railroad Company prior to 1867 accepted the terms of the treaty and agreed to purchase the unallotted lands of the Delawares and to pay for them and for the improvements on them in accordance with the treaty, and this railroad company and its successor, the Union Pacific Railway Company, took the lands subject to the conditions set forth in the treaties as to payment for the land and for the improvements thereon. On October 20, 1860, three commissioners were appointed under the treaty to inspect and appraise the value of all the lands and improvements which the railroad company had agreed to purchase. The improvements then known were appraised at $9,534.25, the appraisement being returned February 23, 1861. A schedule of this appraisement showing the improvements, their location, and value, is attached to the petition. Certain improvements then existing on the land were omitted in this appraisement and afterwards appraised at $1,181.50. An itemized statement of these improvements is attached to the petition.

The Leavenworth, Pawnee and Western Railroad Company being unable to comply with the terms of purchase and pay in gold and silver coin, another treaty was made about July 2, 1861, providing that the railroad company

might execute its bonds, with interest coupons attached, for $286,742.15, and execute a mortgage upon 100,000 acres of land covered by the treaties to secure the same. This was done, but the bonds and mortgage were executed to secure the payment of the purchase price of the land, exclusive of the value of the improvements.

The Union Pacific Railway Company succeeded to all the franchises and property rights of the Leavenworth, Pawnee and Western Railroad Company, and became and is subject to all its liabilities under the treaties mentioned.

By the treaty of July 4, 1866, between the same parties, it was provided in Article I—

> That the United States shall secure and cause to be paid to the said Indians the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee and Western Railroad, according to the terms of a treaty ratified August 22, 1860, and supplemental treaty, and in accordance with the conditions, restrictions, and limitations thereof.

The United States thereby became surety for the payment of the value of said improvements, and under the treaties mentioned is the trustee for the Delawares to collect and dispose of the moneys coming to them under the treaties.

Neither the Leavenworth, Pawnee and Western Railroad Company nor its assignees or successors have paid for the improvements, and Congress, by the act of July 13, 1892, appropriated and paid to the Delaware Indians $10,715.75, which amount, thus paid for such improvements as surety, the United States seeks to recover from the Union Pacific Railway Company.

*Second cause of action.*

By virtue of the treaties mentioned in the first cause of action, the Leavenworth, Pawnee and Western Railroad Company became entitled to a right of way across the Delaware reservation and across the land subsequently allotted in severalty to the Delawares, upon payment of a just compensation therefor. The United States, under the treaties mentioned, became the trustee for the Delawares to collect and account for the amount due them for such right of way and the sureties of the railroad companies for the payment of the same. The Leavenworth, Pawnee and Western Railroad Company, under these treaties, laid out a right of way and constructed a railroad over and across the reservation and over and across certain parcels of land allotted in severalty to the Delaware Indians, and thereby became liable to the United States as trustee for the Delawares for the damages thereby sustained by the latter. A reasonable compensation for the right of way across the allotted land amounts to $28,959.41. This amount was ascertained by a commission appointed under the treaty. A schedule of the appraisement was attached to the petition. The Union Pacific Railway Company is the successor of the Leavenworth, Pawnee and Western Railroad Company, liable for the amount due the Indians for the right of way. The amount mentioned was appropriated and paid the Delaware Indians by the United States, under the act of July 13, 1892. The amount thus paid by the United States as surety is due from the railway company.

## ARGUMENT.

The provisions of the act of July 13, 1892, making appropriations for the improvements and right of way and directing the institution of this suit, was a recognition of the liability of the Government as trustee to the Indians and a legislative assertion that for money thus paid the railway company is liable to it. Whether Congress was correct in the position thus taken an examination of the treaties and pertinent legislation may disclose.

### THE DELAWARE TREATIES.

SUPPLEMENTAL TREATY CONCLUDED SEPTEMBER 24, 1829. PROCLAIMED MARCH 24, 1831. (7 STAT., 357.)

This treaty between the United States and the Delaware Nation of Indians, contained the following provisions creating a permanent reservation:

> It is hereby agreed upon by the parties, that the country in the fork of the Kansas and Missouri rivers, extending up the Kansas River to the Kansas line, and up the Missouri River to Camp Leavenworth, and thence by a line drawn westwardly, leaving a space ten miles wide, north of the Kansas boundary line, for an outlet, *shall be conveyed and forever secured by the United States, to the said Delaware Nation, as their permanent residence; and the United States hereby pledges the faith of the Government to guarantee to the said Delaware Nation forever, the quiet and peaceable possession and undisturbed enjoyment of the same, against the claims and assaults of all and every other people whatsoever.*

Here was a conveyance of land to the Delawares as their permanent residence, and a solemn pledge by the

nation that they should be secured in the quiet possession and undisturbed enjoyment of it against the claims and assaults of all persons whatsoever.

TREATY CONCLUDED MAY 6, 1854. PROCLAIMED JULY 17, 1854. (10 STAT., 1048.)

By Article I of this treaty the Delawares ceded to the United States all their interest in the country situate in the fork of the Missouri and Kansas rivers, which is described in the treaty proclaimed March 24, 1831, and also their interest in the "outlet" described, excepting the portion of the lands sold to the Wyandottes in 1848,

> And also excepting that part of said country lying east and south of a line beginning at a point on the line between the land of the Delawares and the Half-breed Kanzas, forty miles, in a direct line west of the boundary between the Delawares and Wyandottes, thence north ten miles, thence in an easterly course to a point on the south bank of Big Island Creek, which shall also be on the bank of the Missouri River where the usual high-water line of said creek intersects the high-water line of said river.

By Articles II and III the United States agreed to pay the Delawares $10,000 for the tract described as the "outlet," and to have the ceded country, excepting the "outlet," surveyed and sold as public land and the proceeds paid to the tribe.

Article IV provided for the payment of $140,000 to the tribe, in two equal payments, in lieu of certain outstanding annuities.

Article V provided that $46,080, being the school fund, should remain for the present at 5 per cent interest.

By Article VI, annuities amounting to $10,000 were made payable to certain chiefs.

By Article VII, the money arising from the sale of the ceded country not needed for present use was to be invested by the President in safe and profitable stocks, the principal to remain unimpaired, and the interest to be applied for the benefit of the Delawares.

By Article VIII, the determination of the question of how much of the proceeds of the sales should be invested, and how the income of the investment and the portion not invested should be disbursed and distributed, was left to the President pending the enactment by Congress of laws regulating such funds and their application.

Articles XI and XII were as follows:

> ARTICLE XI. At any time hereafter when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their permanent home to be surveyed in the same manner as the ceded country here is, and may assign such portion to each person or family as shall be designated by the principal men of the tribe, provided such assignment shall be uniform.
>
> ARTICLE XII. In the settlement of the country adjacent to the Delaware reservation, roads and highways will become necessary, and it is agreed that all roads and highways laid out by authority of law shall have a right of way through the reserved lands, on the same terms that the law provides for their location through the lands of citizens of the United States; *and railroad companies, when the lines of their roads necessarily pass through the said reservation, shall have the right of way, on payment of a just compensation therefor in money.*

This treaty recognizes the fact that the country ceded to the Delawares by the supplemental treaty proclaimed March 24, 1831, was to be treated as the property of the Delawares. They were to have the benefit of the proceeds of the sale of that part of it ceded to the United States. The money was to be invested by the President in safe and profitable stocks, the income of which was to be applied for their benefit. For the "outlet" the United States paid the Delawares $10,000. The provisions in Articles XI and XII are in line with this view. Whenever the Delawares request it, the reserved country is to be surveyed and allotted in severalty. In the settlement of adjacent territory, roads and highways will become necessary. They are to have a right of way through the reserved land, on the same terms that the law provides for their location through the lands of citizens of the United States. Railroad companies which may pass through the reservation shall have a right of way on payment of a just compensation therefor in money. By whom was this compensation to be paid? By the railroad company. To whom? To the United States, as trustee for the Delawares.

TREATY CONCLUDED MAY 30, 1860, PROCLAIMED AUGUST 22, 1860. (12 STAT., 1129.)

Article I recites the provisions of the treaty of 1854 creating the reservation and providing for its subsequent allotment, states that the Delawares have represented to the Government that they desire a portion of their land allotted, and then provides:

> It is hereby agreed by the parties hereto, that the said reservation shall be surveyed as early as prac-

ticable after the ratification of these articles of agreement and convention, in the same manner that the public lands are surveyed; and *to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres*, to include in every case, as far as practicable, a reasonable portion of timber, to be selected according to the legal subdivisions of survey.

Article II provides that the allotment shall be made in a compact body, that certificates shall be issued for the tracts assigned in severalty, which shall be set apart "*for the exclusive use and benefit of the assignees and their heirs.*" The tracts shall not be alienable in fee, leased, or otherwise disposed of except to the United States, or to members of the tribe, and under regulations to be prescribed by the Secretary of the Interior. The Secretary shall make rules respecting the disposition of the tracts, in case of death, so as to secure them to the families of deceased persons. The article ends with the following paragraph:

*The improvements of the Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building other improvements for them on the lands retained.*

Article III. The *Delaware tribe of Indians, entertaining the belief that the value of their lands will be enhanced by having a railroad passing through their present reservation*, and being of the opinion that the Leavenworth, Pawnee and Western Railroad Company, incorporated by the act of the legislative assembly of Kansas Territory, will have the advantage of travel and general transportation over

every other company proposed to be formed, which will run through their lands, have expressed a desire that the said Leavenworth, Pawnee and Western Railroad Company shall have the preference of purchasing the remainder of their lands *after the tracts in severalty and those for the special objects herein named shall have been selected and set apart*, upon the payment into the United States Treasury, which payment shall be made within six months after the quantity shall have been ascertained, in gold or silver coin, of such a sum as three commissioners, to be appointed by the Secretary of the Interior, shall appraise to be the value of said land: *Provided*, In no event shall the value be placed below the sum of one dollar and twenty-five cents per acre, exclusive of the cost of survey of the same. (And that the United States will issue a patent in fee simple to said company, upon payment as aforesaid, for all their land remaining in Kansas.) It is, therefore, agreed by the United States that the wishes of the Delawares shall be granted, that they will accept of the trust reposed upon them; and that the money resulting from such disposition of the lands shall be disposed of and applied in the manner provided for by the seventh and eighth articles of the Delaware treaty of sixth May, one thousand eight hundred and fifty-four, after expending a sufficient sum to enable them to commence agricultural pursuits under favorable circumstances. *It is also agreed that the said railroad company shall have the perpetual right of way over any portion of the lands allotted to the Delawares in severalty, on the payment of a just compensation therefor, in money, to the respective parties whose lands are crossed by the line of railroad.*

Article IV makes provision for allotment to absent members of the tribe upon their return.

Article V provides for special reservations where the mill, schoolhouse, council house, Baptist mission, and certain churches were standing.

Article VI binds the United States to pay the Delawares $30,000 indemnity for timber cut and $9,500 for ponies and cattle stolen by the whites.

Article VII provides for grants in fee simple by patents of special tracts to the chiefs and interpreter who signed the treaty.

> ARTICLE IX. As these articles are entered into for the sole use and benefit of the Delaware Indians, it is understood that the expenses incident to carrying them into effect shall be defrayed from the funds of said Indians held in trust for them by the United States.

The following amendment was added at the end of Article III by the Senate on June 27, 1860 (12 Stat., 1133):

> It being the intent and meaning of the Delawares, in consenting to the sale of their surplus lands to said company, that they should, in good faith and within a reasonable time, *construct a railroad through their reservation*, and to carry out this intent, as well as to secure so great a public convenience, it is agreed that no patent shall issue for any of these lands, nor shall the sale be binding upon the Delaware Indians nor the United States, until the Secretary of the Interior shall be fully satisfied that a line of twenty-five miles of the road from Leavenworth City shall have been completed and equipped, when a patent shall issue only when the said Secretary shall be satisfied that the road has been in like manner completed and equipped to the western boundary of the

Delaware Reservation. And if the said company shall fail or neglect to construct either the first or second sections of the road, or having constructed the first section and fail to complete the second section within a reasonable time, they shall forfeit to the United States all right to the lands not previously patented, and the certificate of purchase shall be deemed and considered cancelled: *And provided further*, That in case the company shall fail to make payment for the lands, or fail to construct the road, as hereinbefore stipulated, within a reasonable time, the surplus lands shall be disposed of by the Secretary of the Interior at public auction, in quantities not exceeding one hundred and sixty acres, but in no case for a sum less than the appraised value, the net proceeds to be applied in the same manner as hereinbefore specified: *And provided further*, That the said railroad company shall finally and in good faith sell and dispose of all said lands within seven years after receiving the patent therefor, except what may be necessary for railroad purposes, and in default thereof so much thereof as may remain undisposed of shall revert to the Delaware Nation, to be disposed of as is herein provided for other forfeited lands.

TREATY CONCLUDED JULY 2, 1861. PROCLAIMED OCTOBER 4, 1861. (12 Stat., 1177.)

This treaty recites the provision of former treaties with respect to the sale of the surplus land to the Leavenworth, Pawnee and Western Railroad Company and ratifies the arrangement by which the railroad company executed its bonds, secured by mortgage on 100,000 acres of land, for $286,742.15, the appraised value of 223,966.78 acres of surplus land sold the railroad company.

The Senate in its ratification put a limit on the time within which the road should be completed or the company forfeit its right to the land.

TREATY CONCLUDED JULY 4, 1866; PROCLAIMED AUGUST 10, 1866. (14 STAT., 793.)

This treaty provides for the removal of the Delawares into the Indian Territory and the sale of their surplus land to the Missouri River Railroad Company.

> ARTICLE I. That the United States shall secure and cause to be paid the Indians the full value of all that part of their reservation, *with the improvements then existing on the same*, heretofore sold to the Leavenworth, Pawnee and Western Railroad Company, according to the terms of a treaty ratified August 22, 1860, and supplemental treaties, and in accordance with the conditions, restrictions, and limitations thereof.

Article II provides that the Secretary of the Interior may sell to the Missouri River Railroad Company, or other responsible parties, the remainder of the reservation, at a price not less than $2.50 per acre, exclusive of improvements.

Article III, after providing that the land of the adult Delawares electing to become citizens should be reserved from the sale, reads:

> And the Secretary of the Interior *shall cause any and all improvements made on any of the said lands*, the sale of which is provided for, whether held in common or in severalty, *to be appraised, and the value thereof added to the price of said lands, to be paid for when payment is made for the land upon*

*which said improvements exist;* and the money received for the improvements on the land of each Indian held in severalty shall be paid to him at any time after its payment to the Secretary of the Interior when the Department shall be notified that said Indian is ready to remove to the Indian country, to provide for his removal to, and to enable him to make improvements on, his new home therein.

The article then provides for lands to be set apart for children born since the allotment, and concludes:

*And provided further*, That in case there shall be improvements upon any heretofore allotted land, so selected for the children of the Delawares, payment shall be made for such improvement at their appraised value, by the parents or guardians of said children, at the same time as if the said land had been sold to the railroad company or other party.

ARTICLE VIII. That within sixty days after the sale of said land shall have been effected, the purchaser shall pay the said Secretary, in trust for the Delawares, the stipulated price of said unallotted land, *with the appraised value of improvements thereon.*

THE IMPROVEMENTS.

The surplus lands sold to the railroad company under the treaty of May 30, 1860, were unallotted and held in common. It was therefore provided that the purchase price of these lands should be turned over to the Government to be invested for the benefit of the tribe.

The improvements on these surplus lands, made by individual Indians, were not the property of the tribe in common, but were recognized as the property of the individuals who made them. The treaty therefore pro-

vided for a separate appraisement of the improvements, and that the individual owners of the improvements should receive the amount realized from their sale, which was to be expended in building other improvements for them on the lands retained.

The treaty of 1854 had provided that when the Delawares should desire it the land reserved for them should be surveyed and assigned in severalty. The treaty of 1860 executes the former treaty in this respect by providing—

*First.* The reservation is to be surveyed as public lands are, and to each member of the Delaware tribe is to be assigned a tract of 80 acres. (Article I.) Certificates for these tracts are to be issued. (Article II.) Absent members of the tribe are to receive their allotments on their return. (Articles IV.) Special reservations are made for the mill, schoolhouse, council house, and churches. (Article V.) This is the first object of the treaty—the allotment of tracts in severalty and the setting aside of tracts for special objects.

*Second.* After this has been been done, the tracts in severalty and those for special objects selected and set apart, the remainder of the reservation is sold to the Leavenworth, Pawnee and Western Railroad Company. The payment is to be made in gold or silver coin (afterwards changed to bonds), in such sums as three commissioners, to be appointed by the Secretary of the Interior, "shall appraise to be the value of said land." The money resulting from the sale is to be applied, as provided in the seventh and eighth articles of the treaty of

May 6, 1854, in creating a permanent fund, to be invested by the President for the benefit of the Delawares. This is the second object of the treaty—the sale to the railroad company of the surplus lands held in common by the tribe.

*Third.* Upon the lands held in common, thus agreed to be sold to the railroad company, were improvements made by individual Indians; so the treaty provided (end Article II) that "the improvements to the Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building other improvements for them on the lands retained." A separate appraisement was to be made by the Government of these improvements. In place of turning the proceeds of their sale into the common fund to be invested by the Government for the benefit of the tribe, here was a provision that the individual owners of the improvements shall receive the amount realized from their sale.

The thing to be sold here was the improvements. Sold to whom? Certainly not to the Government. The improvements are described as being on the lands to be sold. These lands were to be sold to the railroad company. The improvements were also to be sold to the railroad company. A separate amount was to be realized from their sale, because the provision is that this amount shall go to the individual owners of the improvements, to be expended in building other improvements for them on the lands retained.

The contention of the railway company is that this was a provision that the Government should appraise the improvements and retain out of the proceeds of the sale of the land a sum sufficient to reimburse the individual owners of the improvements. This amounts to an assertion that the tribe should pay the individuals for their improvements. The purchase price of the land, which, under section 3, is to go into a common fund for the benefit of the tribe, is to be reduced by the value of the improvements and paid out to individual Indians. Who got the benefit of the improvements on the land sold the railroad company? The railroad company.

It bought this land to sell again. If it could not use the improvements its assignees could, and the value of the land for sale was increased by the value of the improvements. The language of the treaty contemplates a sale, not simply of the land, but of the improvements. It is the amount realized by the sale of the improvements which is to go to the individual owners thereof. The other side contends that there was no sale of the improvements; the only thing sold was the land; that the land was appraised and sold under Article III; that the provision at the close of Article II is simply for the reimbursement of the owners of the improvements out of the fund from the sale of the land. But the clause at the end of Article II provides that *the improvements shall be sold*, and that the amount realized from the sale of the improvements, which are to be appraised by the Government, shall go to the individual owners of the improvements.

The treaty of 1866, providing for the removal of the Delawares into the Indian Territory and the sale of their surplus lands to the Missouri River Railroad Company, contains, in its more explicit provisions respecting the sale of improvements, what is in effect a declaration by Congress of the meaning of the treaty of 1860. The first article provides that the United States shall secure and cause to be paid to the Delawares "the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee and Western Railroad Company." Provision is then made for the reservation of allotted land of Delawares electing to become citizens, and the treaty proceeds (Article III): "And the Secretary of the Interior may cause any and all improvements made on any of the said lands * * * to be appraised and the value thereof added to the price of said land, to be paid for when payment is made for the land upon which said improvements exist." By Article VIII the purchaser is required to pay to the Secretary of the Interior in trust for the Delawares, "the stipulated price of said allotted land, with the appraised value of improvements thereon."

*Fourth.* The fourth object of the treaty was to grant the Leavenworth, Pawnee and Western Railroad Company a right of way over the allotted land, and to provide for the payment of a just compensation in money for such right of way to the individual Indians whose lands might be crossed by the line of railroad, which will now be discussed.

THE RIGHT OF WAY.

All these treaties recognize the property right of the Delawares in the lands conveyed to them for their permanent home. In the treaty proclaimed March 24, 1831, it was provided (Article XI) that when the Delawares should desire it their land should be surveyed and allotted in severalty, and (Article XII) that roads and highways should have a right of way through the reserved lands on the same terms provided by law for their location through the lands of citizens of the United States, "and railroad companies, when the lines of their roads necessarily pass through the said reservation, to have the right of way, on payment of a just compensation therefor in money." The Government recognizes that the Delawares have property rights in the reserved land and stipulates to protect them in the same manner that the law protects the rights of citizens of the United States when it is necessary to build roads or highways or railroads through their land. The railway shall have a right of way, but only on payment of a just compensation therefor in money. This payment of a just compensation is, of course, to be made by the railway company.

In the treaty of May 30, 1860, after providing for a sale to the Leavenworth, Pawnee and Western Railroad Company of the surplus unallotted land, the following provision, similar in terms to that in the treaty of 1854, was inserted at the close of Article III:

> It is also agreed that the said railway company shall have a perpetual right of way over any portion of the lands allotted to the Delawares in severalty, on the payment of a just compensation therefor,

in money, to the respective parties whose lands are crossed by the line of railroad.

It is to be borne in mind that the allotted lands were distinct from the lands sold to the railroad company. The lands sold were lands held in common. The allotted lands were tracts held in severalty by individual Indians. The provision that the railroad company shall have a right of way over the lands allotted in severalty to the individual Indians is coupled with the condition that a just compensation for this right of way shall be paid in money to the respective parties whose lands are crossed. The compensation to be paid is compensation from the railway company to the individual Indians.

I submit that a distinction must be drawn between tribal lands and allotted lands; between lands held by a tribe in common and lands held in severalty by individual Indians. Tribal lands when allotted, and certificates issued therefor, became private lands owned for all practical purposes by individual Indians. The second article of the treaty required certificates to be issued for the tracts assigned in severalty, specifying the names of the individuals to whom assigned, and the allotted tracts were set apart expressly "*for the exclusive use and benefit of the assignees and their heirs.*" While such tracts could not be disposed of except to the United States or to members of the Delaware tribe, they might be disposed of to them under regulations prescribed by the Secretary of the Interior; and the Secretary was required to make rules respecting the disposition of the tracts, in case of the death of the owners, so as to secure them to their families.

While the United States may be said, in a sense, to have reserved the fee in the allotted tracts, the individual Indians were the real and substantial owners of the land, the Government simply acting as trustee to preserve and protect their rights, the treaty itself (Article III) stating that the United States "accept of the trust reposed upon them."

The language of Article III, selling the railroad company the surplus lands and granting it a right of way through the allotted lands, recognizes the property rights of the Delawares in the lands. The reason assigned in the treaty for the sale of the surplus lands and the grant of the right of way is that the building of the railroad through the reservation will enhance the value of the lands belonging to the Indians, the language being: "The Delaware tribe of Indians, entertaining the belief *that the value of their lands will be enhanced* by having a railroad passing through their present reservation," and believing that the Leavenworth Railroad Company was the best projected line, agrees to sell it the surplus lands and grant it a right of way over the allotted lands.

Acting upon the view that the Indians to whom had been assigned tracts in severalty are the substantial owners of the same, the treaty of July 4, 1866 (Articles III and IX (14 Stat., 719), which provides for the removal of the Delawares to the Indian Territory, gives to the individual members of the tribe the option of becoming citizens of the United States and receiving patents in fee simple for the allotted tracts.

The general policy of the Government with respect to individual Indians holding allotments is expressed in sec. 2119, Revised Statutes, which reads:

> Whenever any Indian, being a member of any band or tribe with whom the Government has or shall have entered into treaty stipulations, being desirous to adopt the habits of civilized life, has had a portion of the lands belonging to his tribe allotted to him in severalty, in pursuance of such treaty stipulations, the agent and superintendent of such tribe shall take such measures, not inconsistent with law, as may be necessary to protect such Indian in the quiet enjoyment of the lands so allotted to him.

The Indian who holds and cultivates an allotment has ceased the roving, nomadic, predatory life of a wild Indian, and has become, in a sense, civilized, akin to the Pueblo Indians described by this court in *United States* v. *Joseph* (94 U. S., 614).

The contention of the railway company is that it acquired its right of way by virtue of the provisions of section 2 of the act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, passed July 1, 1862, which reads as follows (12 Stat., 491):

> SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road earth, stone, timber, and other materials for the construction thereof; said right of

way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. *The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.*

In construing the Pacific Railroad grant, and ascertaining whether it abrogates the special provisions of the treaty of 1860 with respect to the right of way of the Leavenworth, Pawnee and Western Railroad Company over the allotted lands of the Delawares, it is well to keep in mind the general rule that grants by the Government are to be strictly construed; nothing passes by presumption or inference. That construction must be adopted which is most advantageous to the interests of the Government. The statute being a grant of a privilege, must be construed most strongly in favor of the grantor. (*Hannibal, etc., R. R. Co.* v. *Packet Co.*, 125 U. S., 260, 271, and cases cited, especially *Leavenworth, etc., R. R. Co.* v. *United States*, 92 U. S., 733.)

And also that other rule, that a general will not be held to repeal a special statute unless there be a clear implication, unavoidably resulting from the general law, that it was the intention that its provisions should cover the subject-matter previously expressly and specifically provided for by particular legislation. (*Ex parte Crow Dog*, 109 U. S., 556, bottom page 570, and cases cited.)

This act granted the Union Pacific Railway Company a right of way from the Missouri River to the Pacific Ocean through the public lands, the United States agreeing to extinguish as rapidly as may be the Indian title to all lands falling under the operation of the act and required for the right of way. Much of the land between the Missouri River and the Pacific Ocean was, in 1862, Indian country, occupied by wild tribes, whose Indian title was one of mere roving occupancy. (*Leavenworth, etc., R. R. Co.* v. *United States*, 92 U. S., 733, bottom page 734.)

In view of the decisions of this court in *Buttz* v. *Northern Pacific Railroad* (119 U. S., 55, 71), and *Missouri, Kansas, etc., Ry. Co.* v. *Roberts* (152 U. S., 114, 116), I am constrained to concede that Indian reservations held in common by tribes, where the fee is in the Government, the land under its control, and the title one of mere occupation, may be treated as public lands within the meaning of grants like this. But I submit that lands allotted in severalty to individual Indians have ceased to be public lands and become private lands, held by individuals. The titles had ceased to be Indian titles in the sense in which the term is commonly used, as a title held by a nation or tribe. What I submit with respect to the Union Pacific act, read in connection with the Delaware treaties, is—

*First.* The subject of the right of way by the Leavenworth, Pawnee and Western Railroad through the allotted lands of individual Delawares had been completely covered and provided for by the treaty of 1860 and

therefore can not be treated as within the operation of the Pacific Railroad act of 1862. The treaty of 1860 must be considered as an entirety. The Delawares agreed to sell their surplus lands at a minimum price to the Leavenworth Railroad Company on condition that it build a railroad through their reservation within a limited time and pay the individual owners of allotted tracts a just compensation for the right of way across their lands. The reason for the sale of the surplus lands is stated in the treaty to be that the construction of the road would enhance the value of the remaining lands, the allotted tracts. The railroad company accepted the terms of this treaty and took the surplus land. Having enjoyed the privilege, it must pay the price. Having received the benefits, it must bear the burdens.

*Second.* The lands allotted in severalty to individual Indians can not be deemed to be public lands within the meaning of the Pacific Railroad grant of 1862. I have already given the reasons why. But if they can be so treated, and if the grant applies to them, the concluding clause as to extinguishing Indian titles must be read in the light of the provisions of the treaty of 1860. The treaty of 1860 having already provided a method of extinguishing the titles of individual Indians to land covered by the right of way, no further provisions by the Government were necessary, or indeed possible, and the railroad company was required to comply with the provisions of the treaty and extinguish the title by paying the individual owners a just compensation for damages incurred. The special method of extinguishing the title

to allotted lands on the right of way by payment on the part of the railroad company of compensation to the individual holders could not be affected by the general provisions in the Pacific Railroad act, which was intended to apply and did apply only to the Indian country, or Indian lands, with respect to which the United States had not at that time provided a means of extinguishing the Indian title.

*Third.* Let the court consider whether, under the provisions of the treaty of 1860, the Government could in honor agree to extinguish the titles to the allotted lands in any other way than that marked out in the treaty. I submit that the Government could not, without a breach of faith, grant a right of way through the allotted lands owned by individual Delawares without insisting upon a compliance with the terms of the treaty of 1860 and the payment of a just compensation, by the railroad, to the respective parties whose lands might be crossed by its line. In other words, the grant of 1862 can not be held to abrogate the special provisions for compensation in the treaty of 1860 without a breach of treaty obligations and a violation of national faith and honor. This is sufficient reason for holding that the treaty of 1860 was not repealed or modified by the Pacific Railroad act of 1862.

*Fourth.* The case of *Grinter* v. *Kansas Pacific Railway Company* (23 Kans., 642) is cited in support of the railroad company's position that the right of way through the Delaware allotments was granted by the act of 1862, and that, if any compensation was to be paid the allottees, the Government, by agreeing to extinguish the

Indian title, undertook to pay it. In the Grinter case the court held that the United States had power to grant a railroad a right of way through the allotted lands held by individual Delawares irrespective of the provisions of the treaty of 1860; and did grant it; and that if the grant had not been made by the act of 1862 the road could not have been built. But the grant under the treaty was a present one; the railroad company could and we claim did enter the lands of the allottees under its authority, leaving the matter of compensation to be settled later. (*Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S., 641, 660.) It occurs to me that the real question is not one of power, but whether Congress intended in the Pacific Railway act to make a grant which should override the treaties with the Delawares and violate their provisions. Conceding that the Government may ignore its obligation and break its faith, the question yet remains whether, in this act, it intended to do so. There was a vast stretch of public lands between the Missouri River and the Pacific Ocean for this grant to operate on. I submit that in the absence of express terms the grant will not be held to apply to the lands allotted under the Delaware treaty.

In *Leavenworth, Lawrence and Galveston Railroad Company* v. *United States* (92 U. S., 733) it was held that a grant to the State of Kansas of public lands to aid in the construction of a railroad did not cover and include the lands of the Osage tribe of Indians reserved under a treaty. The language of Mr. Justice Davis, who delivered the opinion of the court, is well considered and

instructive. After calling attention to the general rule that grants of this description are strictly construed against the grantee, and pointing out the particular provisions of the grant under consideration, he discusses the stipulations of the treaty with the Osage Indians, and holds that the grant can not be held to apply to the Osage lands without ignoring their rights under the treaty, which it was not to be presumed Congress intended to do. Lands reserved for the exclusive and perpetual use of Indians would not be regarded as covered by general terms in a subsequent grant. "*Congress can not be supposed to grant them by a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose.*" (Bottom p. 746.)

> It would be strange, indeed, if, by a certain act, Congress meant to give away property which a just and wise policy had devoted to other purposes. That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the Government and saved from a possible grant, is a proposition which will command universal assent (p. 746).

THE DEFENDANT COMPANY IS THE SUCCESSOR OF THE LEAVENWORTH COMPANY.

The railroad company claims that it is not the successor of the Leavenworth, Pawnee and Western Railroad Company, and asserts that the corporation of that name organized by the legislature of the Territory of Kansas is not the same entity as that mentioned in the act of Congress of July 1, 1862. It is, however, conceded

that the Union Pacific Railway Company, defendant, is the successor of the Leavenworth, Pawnee and Western Railroad Company named in said act; that it is in possession of a right of way through the allotted lands, and that the improvements on the unallotted land went with it to the purchaser thereof.

It can hardly be successfully contended that the defendant railway company can accept and retain all the benefits which flowed to the Leavenworth Company under the Delaware treaties, and yet deny that it is its successor and responsible for its debts.

The act of Congress did not create the Leavenworth, Pawnee and Western Railroad Company. It simply conferred upon an existing corporation of that name certain rights. The act, in terms, recognizes the existence of the Leavenworth Company, and conditionally clothes it with further and additional rights and power. The language of the act of Congress will bear no other construction. Section 9, in part, is as follows:

> *And be it further enacted*, That the Leavenworth, Pawnee and Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri River at the mouth of the Kansas River, on the south side thereof, so as to connect with the Pacific Railroad of Missouri to the aforesaid point.

This clearly recognizes the existence of the Leavenworth Company *of Kansas*, the corporation called into existence by the act of the Territorial legislature. All

through the Pacific act, wherever the line of road to be built westerly from the mouth of the Kansas River is referred to, the right to build it is spoken of as in the "Kansas Company." For example, in section 10 these words are used: "That the said company, *chartered by the State of Kansas*," etc.

The argument of the other side proceeds from the premise that Congress, in express words, created and erected into a body corporate and politic in deed and law, by the name, style, and title of "The Union Pacific Railroad Company," to build a railroad from Omaha, but purposely refrained from doing so as to the railroad to be built from Kansas City. If it was not the intention to take hold of an existing corporation and confer upon it rights and grants which Congress alone could bestow, the same formula would have been followed in section 9 as in section 1 of the act. If this was not the purpose, Congress could not, and would not, have used the language above quoted. Nor would the same name as that selected by the Kansas legislature have been used if it was intended to primarily create the corporation. A significant fact in this connection is that less than a year before one branch of this same Congress had ratified a treaty by which the Leavenworth, Pawnee and Western Railroad Company obtained the right to pay for the unallotted land of the Delaware Indians in bonds instead of cash. (12 Stat., 1177.)

In the Grinter Case, heretofore referred to, it is admitted that the Kansas Pacific Railway Company was the successor of the Leavenworth, Pawnee and Western Rail-

road Company of Kansas, and it will not be denied that the Kansas Pacific Company was one of the constituents of the present consolidated corporation.

The allegations of the petition are sufficient to establish a liability against the defendant railway company, unless the law of which the court takes judicial notice, defeats that liability; and in the face of these averments of fact the petition, as against a demurrer, must be held sufficient.

Concededly, these are the facts in reference to the birth and life of the various corporations. The Leavenworth, Pawnee and Western Railroad Company was incorporated by the Territorial legislature in 1855. (Laws of Kansas, 1855, p. 914.) By section 21 of its charter, this corporation is given power to receive and hold grants of land from the United States. Between July 1, 1862, and July 2, 1864, this company assumed the name of the Union Pacific Rail*way* Company, Eastern Division. The name of the corporation *created* by Congress was the Union Pacific Rail*road* Company. In section 12, of the act of July 2, 1864 (13 Stats., 356), the company is spoken of as the "Leavenworth, Pawnee and Western Railroad Company, now known as the Union Pacific Railroad Company, Eastern Division." And this section makes it manifest that the corporations were deemed by Congress to be separate entities; for it is there provided that if the Union Pacific Railroad Company shall not have built the road from Omaha westward at a certain time that the Kansas company may proceed so to do, and make the connection with the Central Pacific

Railroad Company, which the Union Pacific Railroad Company, proper, is first authorized to make. By the joint resolution of March 3, 1869, the Union Pacific Railway Company, Eastern Division, was authorized to change its name to the Kansas Pacific Railway Company. Under authority of the act of March 3, 1869 (15 Stats., 324), the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company were consolidated under the name of the Union Pacific Railway Company. Such a consolidation was also authorized by section 16 of the act of July 1, 1862, and by section 16 of the amendatory act of July 2, 1864.

On these facts and for these reasons it is plain that the present defendant is the successor, and subject to the liabilities in respect of the matters involved in this action, of the Leavenworth, Pawnee and Western Railway Company.

In the case of the *Kansas Pacific Railroad Company* v. *Atchison, Topeka and Santa Fe R. R. Co.* (112 U. S., 414), Mr. Justice Field, speaking for the court, says (p. 414):

> The plaintiff's original name was The Leavenworth, Pawnee and Western Railroad Company, and it is thus termed in the act of Congress of 1862 creating the Union Pacific Railroad Company. After the Territory became a State that name was changed to the Union Pacific Railroad Company, Eastern Division, and the corporation was so called in subsequent legislation of Congress until some time in 1869, when it received its present designation.

It is respectfully submitted that the first and second questions certified should be answered in the affirmative, and the third in the negative.

JOHN K. RICHARDS,
*Solicitor-General.*

NOVEMBER 27, 1897.

# Supreme Court of the United States.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

THE UNION PACIFIC RAILWAY COMPANY and S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, F. R. COUDERT and JOHN W. DOANE, as Receivers of the Union Pacific Railway Company,
Defendants in Error.

**No. 133. October Term, 1897.**

## ARGUMENT FOR DEFENDANTS IN ERROR.

### STATEMENT.

This suit is brought under the direction of the Attorney-General pursuant to the provisions of the Act of Congress approved July 13, 1892 (27 Stats., 126).

In the first count of the petition, the United States claims to recover the sum of $10,715.75, with interest at seven per cent., from the 30th of May, 1860, as the amount or value of certain improvements on the lands of the Delaware Indians. This claim is based on the last clause of article 2 of the treaty between the

United States and the Delaware Indians, ratified August 22, 1860. This clause reads as follows:

"The improvements of the Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building other improvements for them on the lands retained."

The second count of the complaint sets up a claim to recover from the defendants the sum of $28,954.41, being the value of lands taken by the defendant company, or its predecessor, the Leavenworth, Pawnee and Western Railroad Compaay, for right of way through certain lands in the Delaware Reservation allotted under the provisions of said treaty of 1860 to the Delawares in severalty, together with interest on said sum at the rate of seven per cent. from January 1, 1863. This claim rests upon the provisions of article 3 of the said treaty, which concludes as follows:

"It is also agreed that the said railroad company [Leavenworth, Pawnee and Western] shall have the perpetual right of way over any portion of the lands allotted to the Delawares in severalty, on the payment of a just compensation therefor, in money, to the respective parties whose lands are crossed by the line of railroad."

A demurrer to the petition, on behalf of the defendant railway company and its receivers, was sustained by the Circuit Court on the ground, *inter alia*, that the petition stated no cause of action against the company or its receivers. A writ of error was taken to the Circuit Court of Appeals for the Eighth Circuit. That court, without deciding the cause, certified the following questions to this Court (Record, p. 9):

"FIRST. Upon the facts stated in the first and second counts of said petition, is the United States entitled

to recover from the Union Pacific Railway Company, or the receivers thereof, the whole or any part of the sum of $10,715.75, heretofore paid by the United States to the Delaware Indians, pursuant to the act of Congress of July 13, 1892 (27 Stat., c. 164, p. 126), for improvements upon lands sold to the Leavenworth, Pawnee & Western Railway Company?

"SECOND. Upon the facts stated in the first and second counts of said petition, is the United States entitled to recover from the Union Pacific Railway Company, or the receivers thereof, the whole or any part of the sum of $28,954.41, heretofore paid by the United States to individual members of the tribe of Delaware Indians, pursuant to the provisions of the act of Congress of July 13, 1892, for and on account of right of way through allotted lands belonging to members of said tribe, which right of way was secured by the Leavenworth, Pawnee and Western Railroad Company, in accordance with the concluding clause of article 3 of a treaty concluded with the tribe of Delaware Indians on May 30, 1860?

"THIRD. Upon the facts stated in the first and second counts of said petition, were the demurrers thereto properly sustained?

## ARGUMENT FOR THE RAILWAY COMPANY AND ITS RECEIVERS.

I propose to meet the questions raised on this record on the merits. I maintain that the demurrers to the petition were properly sustained by the Circuit Court.

### I.

**Upon the facts stated in the first and second counts of the petition the United States is not entitled to recover from the Union Pacific Railway Company or its Receivers, the whole or any part of the**

**sum of $10,715.75 paid by the United States to the Delaware Indians under the Acts of Congress of July 13, 1892** (27 Stat., c. 164, p. 126), **for improvements upon the lands sold to the Leavenworth, Pawnee and and Western Railroad Company.**

The petition alleges that the defendant the Union Pacific Railway Company is the successor and assignee of the said Leavenworth, Pawnee and Western Railroad Company, and for the purposes of this argument it will be assumed that such is the fact. That is to say, the name of the Leavenworth, Pawnee and Western Railroad Company was changed first into that of the Union Pacific Railway Company, Eastern Division, and then to that of the Kansas Pacific Railway Company, and the said Kansas Pacific Railway Company consolidated under the provisions of section 16 of the act of July 1, 1862, and section 16 of the act of July 2, 1864, with the Denver Pacific Railway and Telegraph Company and the Union Pacific Rail*road* Company into a new corporation called the Union Pacific Rail*way* Company, to wit, the defendant herein.

The claim here made by the United States to recover for these improvements rests alone upon the construction of the treaty of the United States with the Delaware Indians ratified August 22, 1860. The full text of this treaty is reprinted in the appendix to the brief of A. L. Williams in the Circuit Court of Appeals, which brief is herewith submitted as a part of this argument (Mr. Williams' brief, pp. 19-30). The treaty of 1861 modifying the foregoing treaty is also printed in the appendix to Mr. Williams' brief, pages 30–40.

The scheme and purpose of the treaty of 1860 were, first, that the government should set apart to each mem-

ber of the tribe eighty acres of land in severalty, and, second, to sell the surplus lands to the Leavenworth, Pawnee and Western Railroad Company at a price not less than $1.25 an acre, to be determined by three commissioners to be appointed for that purpose by the Secretary of the Interior. By article 3 of the treaty the Indians

"have expressed a desire that the said Leavenworth, Pawnee and Western Railroad Company shall have the preference of purchasing the remainder of their lands after the tracts in severalty and those for the special objects herein named shall have been selected and set apart [See article 5] upon the payment into the United States Treasury, which payment shall be made within six months after the quantity shall have been ascertained, in gold or silver coin, of such a sum as three commissioners, to be appointed by the Secretary of the Interior, shall appraise to be the value of said land."

This is the only provision for the sale of the unallotted lands to the railroad company. This is the only provision for any appraisement of lands. There is no provision for any appraisement of improvements or of the right of way through the allotted lands. These surplus lands were appraised, as appears by the petition, at the sum of $286,742.15. The company was unable to pay the price in cash within six months, and the provisions of the treaty in this respect were modified by the treaty of 1861, above referred to, by which the bonds of the company were taken for the purchase price, payable in ten years and secured by a mortgage of the railroad company upon 100,000 acres of the land purchased. By the treaty of 1861 it is recited that the said surplus lands, to the amount of 223,966.78 acres, have been surveyed and appraised at an aggregate valuation of $286,742.15, and the treaty provides in terms that the company shall execute bonds for the

last-named amount, payable in ten years, with a mortgage to secure the same, and that when the said purchase price is paid within the time specified, patents shall issue to the railroad company for such lands; for the provision of the treaty of 1861, is that the company, upon payment of the appraised value of the lands, was to get a patent in *fee simple* (see Appendix to Mr. Williams' Brief, pp. 22, 26, 36, 41).

Now, it is sought, a generation afterwards to make the defendant the railway company liable as part of the purchase price of the lands for certain improvements which were upon them at the date of the treaty. The plain answer to this claim is that the value of the lands as ascertained by the three commissioners appointed by the Secretary of the Interior included a *full title to the lands purchased*, because it was provided that upon payment of the said price the United States should issue a patent in fee simple to the company. The contention of the United States is that the appraised value of the land is not the full purchase price, but that the purchase price is this sum plus the value of the improvements thereon, to wit, $10,715.75. This claim, which I cannot regard but as extraordinary, is based upon the last clause of article 2 of the treaty of 1860, to wit:

> "The improvements of the Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amounts realized from the sale of the same, to be expended in building other improvements for them on the lands retained."

The obvious and indisputable meaning of this is that, as the treaty (Art. 3) provides for the sale of the lands, for the ascertainment of the price and upon the payment of the price so ascertained, for the issue of patents and

the receipt of the money by the United States for the use of the Delaware Indians to be applied as provided in the treaty—I say, the meaning of this provision in Art. 2 about improvements is that the United States shall value the scattered improvements of the Indians upon some of the lands sold, and that the value of these improvements as fixed by the United States shall be paid by the United States to the individual Indians out of the amount realized from the sale of the lands as provided in article 3 of the treaty.

**We deny that there was any sale of the improvements separate from the land.** The duties of the government were two-fold: Under article 3 of the treaty the government was to sell the fee simple title to the lands and get pay therefor, and there was no separate sale, or provision for the sale of the improvements, or provisions for the separate appraisement of the improvements, so far as the purchaser was concerned, and no such sale was made. No agreement on the part of the Company to pay the appraised value of these improvements is alleged. Under the last clause of article 2 of the treaty the government was to fix, in any way or manner it might please to adopt, the value of the improvements belonging to individual owners and pay the value thus fixed out of the amount realized from the sale of the lands, the same to be expended in building other improvements for them on the lands retained.

If it had been intended that the purchase price of the land should include also the price of the improvements it would have been so specified in this treaty. But it was not. In the treaty of July 4, 1866 (14 Stat., 793), between the United States and this tribe, whereby the tribe agreed to sell its remaining rights

in the reservation, it was expressly stipulated as follows:

"And the Secretary of the Interior shall cause any and all improvements made on any of the said lands, the sale of which is provided for, whether held in common or in severalty, to be appraised, and the value thereof added to the price of said lands, to be paid for when payment is made for the lands upon which said improvements exist; and the money received for the improvements on the land of each Indian held in severalty shall be paid to him at any time after its payment to the Secretary of the Interior, when the Department shall be notified that said Indian is ready to remove to the Indian country, to provide for his removal to, and to enable him to make improvements on his new home therein" (14 Stat., p. 794).

The absence of any such provision in the treaty of 1860 and the insertion of provisions inconsistent therewith, to wit, that the company shall be entitled to have a patent issued for the land in fee simple on paying the appraised value of the land, is a conclusive demonstration, to my mind, that the contention of the government here is unfounded.

This was the construction put upon the treaties of 1860 and 1861 by the Interior Department of the United States thirty years ago; and, if there were any doubt as to its true construction, that construction should not now be disturbed. This construction of the treaty of 1860 is evidenced by the particular provisions contained in the treaty of 1861.

The stipulated patent would carry the title to the improvements as well as to the lands, and we therefore insist with confidence that the Government cannot, on the record, maintain an action for the value of part of the lands; tow it, the improvements thereon.

## Petition Fatally Defective.

In any view the petition is fatally defective in not setting out any ground of liability for these improvements. It states, indeed, that on the 23d of February, 1861, three commissioners appraised the said improvements, and that a schedule of such appraisement was returned to the Interior Department. But the petition nowhere alleges that the Railroad Company ever agreed to pay the appraised price or any price for the improvements, or that they ever received the improvements or any benefits from them. On the contrary, the petition alleges facts from which it appears that it must have been understood at that time by the Interior Department and by the Railway Company that the railway company was not to make any separate payment for the improvements, but that the said sum of $286,742.15 was the entire compensation contracted to be paid or expected to be paid by the railway company for the lands, including the improvements thereon. On this understanding proceeds the entire subsequent treaty of 1861. It provided for no other payment, and it provided that when this sum were paid a patent in fee simple should issue for the lands. It is inconceivable that, if President Lincoln and the Interior Department in 1861 understood that these improvements were to be paid for separately from the lands by the company, some provision in relation thereto would not have been embodied in the treaty of 1861, or that payment in money would not have been then demanded. This claim, therefore, that the railroad company is under a liability for these improvements, is plainly an afterthought, born thirty years out of due time.

The provisions of the treaty are inconsistent with the idea that there was to be any further payment except the appraised value of the lands. Take, for example, the provision in the treaty of 1861 (Williams' brief, p. 27), that if the company fails to make payment for the lands or to construct the road as stipulated,

"the surplus lands shall be disposed of by the Secretary of the Interior at public auction in quantities not exceeding 160 acres, but in no case for a sum less than the appraised value, the net proceeds to be applied in the same manner as hereinbefore specified."

This shows that the lands thus sold includes the improvement, since it shows that if the company fails to make payment for the lands they are to be sold in fee simple to another purchaser who would get a fee-simple title without making any separate payment for the improvements. This consideration, in connection with the fact that there is no allegation in the petition that the Leavenworth company agreed to pay for the improvements or even received any benefit from them, is decisive against the existence of any liability to pay for these improvements being shown by the allegations of the petition.

The Government is in this predicament: The petition does not allege that the Leavenworth, Pawnee and Western Railroad Company have paid for the lands or got them. If the company did pay for them, then the presumption is that it got a patent in fee simple, and the United States, therefore, would have no further claim. If, however, it did not pay for them, then the presumption is that the United States exercised the right reserved by and provided for in the treaty of 1861 to forfeit the lands and

all improvements thereon, in which case there would be no liability on the part of the Railroad Company to pay for the lands or improvements. The petition, therefore, in any view, does not state facts showing a liability to pay for these improvements, and the demurrer was rightly sustained.

Other considerations with respect to this question are so forcibly, and, it seems to me, so unanswerably presented in Mr. WILLIAMS' brief, that I do not elaborate them here.

## II.

**Upon the facts stated in the first and second counts of the petition the United States is not entitled to recover from the Union Pacific Railway Company, or its receivers, the whole or any part of the sum of $28,954.41 heretofore paid by the United States to individual members of the tribe of Delaware Indians pursuant to the provisions of the act of Congress July 13, 1892, for and on account of right of way through allotted lands belonging to members of the said tribe.**

This proposition is the negative of the second question certified to this Court. The right of way here in question is wholly upon the line of railroad of the Union Pacific Railway Company (formerly the Kansas Pacific

Railway Company), between Kansas City, Missouri, and Lawrence, Kansas. None of it is on the line between Lawrence and Leavenworth; that is to say, none of it on the line of the chartered route of the Leavenworth, Pawnee and Western Railroad Company.

The treaty of 1860 (article 3) contained this provision:

"It is also agreed that the said railroad company [to wit, the Leavenworth, Pawnee and Western Railroad Company] shall have the perpetual right of way over any portion of the lands allotted to the Delawares in severalty, on the payment of a just compensation therefor, in money, to the respective parties whose lands are crossed by the line of railroad."

The treaty of 1860 directed an allotment of eighty acres to each member of the Delaware tribe in a compact body under the direction of the Secretary of the Interior. It provided that certificates should be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they had been assigned respectively, and that the said tracts were set apart for the exclusive use and benefit of the allottees and their heirs. And the treaty further provided that said tracts should not be alienable in fee, lease, or otherwise disposed of, except to the United States or to members of the Delaware tribe, and under such rules and regulations as might be prescribed by the Secretary of the Interior; and that said tracts should be exempt from levy, taxation, sale or forfeiture, until otherwise provided by Congress.

This treaty did not affect the tribal relations of these allottees to each other, nor was the dominion of the United States in and over the lands thus allotted in any manner diminished. The control of the Indians

and the disposition of the lands by the Indians remained as before in the Government, unaffected by this treaty. The provisions of the treaty in respect of an allotment are simply provisions *inter sese* between the United States and the Delawares. The reserved control of Congress over the Indians and over the lands allotted to them is apparent on the face of the treaty. The treaty gave the railroad company no right of entry upon any terms. The company had no power to exercise the right of eminent domain within the boundaries of the Delaware reservation. The act of Congress admitting the Territory into the Union, as well as the organic act for the Territory, reserved the power of Congress over all the rights of the Indians, their lands and property (*The Kansas Indians, 5 Wall., 774*). These considerations were fully pointed out to the Supreme Court of Kansas in Judge USHER'S argument, in the case of *Grinter vs. The Kansas Pacific Railway Company, 23 Kans., 642*, involving the very question, decided in 1880 by the Supreme Court of Kansas, HORTON, VALENTINE and BREWER, JJ., which case will be hereafter referred to.

In this condition of things arose the great national necessity for a railroad to the Pacific pending the Civil War in 1862. By section 2 of the act of Congress of that year creating the Union Pacific Railroad Company it was provided as follows:

"That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line. * * * The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made."

Section 9 of said act provided as follows:

"That the Leavenworth, Pawnee and Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river on the south side thereof, so as to connect with the Pacific Railroad of Missouri to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned and to meet and connect with the same at the meridian of longitude aforesaid." * * *

Each of the said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.

"SEC. 10. That the said company chartered by the State of Kansas shall complete 100 miles of their said road, commencing at the mouth of the Kansas river aforesaid, within two years after filing their assent to the conditions of this act, as herein provided, and 100 miles per year thereafter until the whole is completed."

In the case of *Grinter vs. The Kansas Pacific Ry. Co., supra*, which was an action for trespass brought by the husband of an Indian allottee, wherein the plaintiff claimed that the Kansas Pacific had no right of way through allotted lands, the Supreme Court of Kansas, commenting upon the above provisions of the act of Congress, says:

"By the act of 1862, the company which the defendant succeeded was required to file an acceptance of its provisions within six months after its passage, and to complete 100 miles of its road, commencing at the mouth of the Kansas river, within two years thereafter, so immediate and urgent action was demanded. If the grant did not include the Delaware reservation, all attempts to construct a road west from the mouth of the Kansas river over the reservation must have been suspended until arrangements were completed with the allottees on the lands. This

would have been an insuperable obstacle to laying out a right of way and constructing the road. The lands were withdrawn from the operation of state laws, and neither the charter of the company nor the general laws of the state could be resorted to for power to condemn them. * * * **Under all the circumstances, we think that within the meaning and scope of the act of 1862, the purpose of Congress was to permit the entry and the construction of the road of the Leavenworth, Pawnee & Western Railroad Company through the reservation without compensation on the part of the company.** * * * The United States agreed to extinguish the Indian titles for the right of way of the Pacific roads as an additional aid to the enterprises, and to induce their early construction. The Leavenworth, Pawnee & Western Railroad was incorporated into the system, and the United States assumed the obligation to give it the right of way through the Delaware reservation. This it could do within the exact terms of the treaty of 1860, by paying the Delaware allottees just compensation therefor. **Whether such allottees have made a demand of the Government for this compensation, we are not advised; clearly, the Government, and not the defendant, if any one, owes the compensation.**"

Congress in the legislation of 1862 must be supposed to have known the provisions of the treaty of 1860, and having these in mind it said: "Time is important; we will grant you the right of way through the Indian reservation and undertake to extinguish the Indian title." They did extinguish it, according to their contract obligation, for, as held by this court and the Supreme Court of Kansas, acceptance by the company of the terms and conditions of the grant of 1862 made a contract binding upon both parties, and the acts embodied all the terms and provisions of the contract. There was, *inter alia*, a contract as to the right of way. This is found in the provision

making an absolute grant of the right of way, and the further provision to extinguish all Indian titles and rights which stood in the way of making the grant of the right of way effective. This grant was made upon new and different considerations from those which were dealt with or in mind in the treaty of 1860—namely, the benefit which the United States would obtain from the speedy construction of the said railroad and in the transportation of mails, troops and government supplies, and in the closer union between the Pacific states and territories and the country East of the Missouri river. These were wholly new and different considerations, and constituted, and were intended to constitute, the full and only compensation which the railway company should pay for the right of way over the lands which were subject to Indian titles of any character. And it was upon reasons and considerations of this character that this Court recently adjudged the case of the *United States against Stanford*, 161 U. S., 412, where the United States sought to go behind the legislation of 1862 and to establish a stock liability under the laws of the State of California, as they seek in this case to go behind the act of 1862 and to establish a liability against a state corporation under a former treaty, which had no reference whatever to the enterprise of building the Pacific railroads. The court held that these acts of Congress, beginning with the act of July 1, 1862, contain all of the obligations of these companies or of their stockholders to the United States. And this court enumerated at great length the considerations which moved Congress to make these grants to the several Pacific Railroad companies and showed that these were the compensations and payments, and

the only compensations and payments, which the United States were to be entitled.

In the land grant acts and particularly the Pacific railroad acts the difference between the present unconditional grant of the right of way and the grant of lands outside of the way is marked and emphasized, and forms the ground of judgment in numerous cases decided in this court and elsewhere.

*St. Joe, &c., Co. vs. Baldwin*, 103 U. S., 426; s. c., 7 Neb., 120.

*Rider vs. Burlington, &c., R. R. Co.*, 14 Neb., 120.

*Union Pacific Ry. Co. vs. Douglas County*, 31 Fed. Rep., 540 (BREWER, J.).

*Buttz vs. Northern P. R. R. Co.*, 119 U. S., 55.

*Grinter vs. Kansas Pacific Ry. Co., infra.*

Here is a present absolute grant of the right of way through all public lands, with an undertaking on the part of the United States to extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way. The act of Congress required the construction of a railroad from the Missouri river, at the mouth of the Kansas river, by the way of Lawrence and Topeka, and this construction could not be made without passing through this reservation. It will be noticed that the grant of the right of way by the Act of 1862 is absolute in terms, and was absolutely essential to the building of the road. The only Indian lands on the line of the Kansas Pacific railway were the Delaware and Pottawatomie reservations, which, as to their legal status, were identical. The act of 1862 contained no eminent-domain provisions. There were eminent-domain provisions in the act of July 2, 1864, but

none authorizing the condemnation of Indian titles. The treaty of 1860 contained no provision for valuation or assessment of the right of way. For the great public purposes recited in the act of 1862 Congress undertook to grant a free right of way through all public lands to the Pacific Railroad companies, and to extinguish as rapidly as possible the Indian titles to all lands required for the right of way. The United States was *dominus*. It had a right so to provide. It did so provide. Any other construction, there being no provisions for condemning and paying for the rights of the Indians, would have blocked the building and completion of this national work. This suit is an attempt on the part of the United States to make the company pay for a right of way which it had given as one of the inducements for the company to undertake the construction of the Congressional roads. The United States is estopped by its own grant from maintaining this action.

## THIS QUESTION RES JUDICATA.

This precise question came before the Supreme Court of Kansas in the above-mentioned case of *Grinter vs. The Kansas Pacific Railway Company., 23 Kans., 642*. The points adjudged in that case are embodied in the head-notes of the official reporter. These head-notes or *syllabi*, prepared, as I understand, by the judges as the authentic statement of the points in judgment, are as follows:

"1. *Damages, no cause of action for.* G., a citizen of the United States, emigrated from Kentucky to the

territory of Kansas, in 1853, and married a Delaware woman, a member of the Delaware tribe of Indians, but was not himself adopted into the tribe. In 1854 he established his residence on the Delaware reservation, in Wyandotte county, and has since lived there. On the 15th of July, 1872, he brought an action in the district court of that county, against the Kansas Pacific railway company, charging the defendant with breaking and entering his close, in November, 1868, and *continuando transgressionem prædictam*. The land which he claimed to possess and occupy had been allotted to his wife and children in severalty under the provisions of the Delaware treaty of May 30, 1860, and he had no other claim or title to it. *Held*, That he was not entitled to recover any damages, notwithstanding the defendant entered and constructed its road over the land so allotted in severalty, without paying compensation therefor.

"2. *Delaware Indian treaty; titles to land.* There is nothing in the Delaware treaty of May 30, 1860, to indicate that any other right or title was granted to the allottees and assignees by the stipulations of articles 1 and 2 than the right of occupancy, with the ultimate fee of the land in the United States.

"3. *Delaware reservation, power of Congress over.* In 1862 Congress had the exclusive right and dominion over the Delaware reservation in Kansas, and had full power to permit the construction of a railroad over such reservation by the Leavenworth, Pawnee and Western Railroad company of Kansas, either with or without compensation to be paid by the company.

"4. *Delaware reservation, right of railway company over.* Under the provisions of the act of Congress of July 1, 1862, entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes,' congress granted to the Leavenworth, Pawnee and Western railroad company of Kansas, in 1872, called the Kansas Pacific railway company, now the Union Pacific railway, Kansas division, the right of way through the public lands of the United States for its road, and agreed to extinguish as rapidly as might be the Indian title required for such right of way. This grant included a right of way through the Delaware reservation in Kansas, and under the grant the com-

pany had the authority, in November, 1863, without paying compensation to the Delaware allottees, to enter upon the reservation for the purpose of locating its line of road and laying out its right of way, and thereafter of constructing and operating its road over and across said land."

These head-notes are fully sustained by the opinion and judgment of the court in the case. It is idle to say that they are *obiter*.

The same question was adjudged in the second case of *Grinter vs. The Kansas Pacific Railway Company, 23 Kans., 659*, which was a case wherein the members of the tribe were parties. That decision was followed on the circuit by Mr. Justice BREWER in the case of the *Union Pacific Railway Company vs. Shannon, trustee*, reprinted in the appendix to Mr. WILLIAMS' brief at page 44.

This matter is very plain. If the Leavenworth, Pawnee and Western Railroad Company had, as a Kansas corporation *simpliciter*, obtained the right of way under the provisions of the treaty of 1860 (article 3, last clause), it would have had to pay a just compensation in money. That is the extent of that clause, and the rights which it confers, and the obligations which it imposes. Then came the Pacific Railroad act of 1862 by which a new situation was particularly dealt with, the company specified, its route prescribed (which necessarily went through this particular Indian Reservation), its essential character and purpose changed, and, as part of a new scheme of a national character, a right of way was specifically granted not only generally but through the Indian reservations and lands, accompanied by an obligation of the United States to extinguish the Indian

title. It was under this act, and not under the provisions of the treaty of 1860, that the company acquired its right of way and built its road thereon, and so there is no conflict between the Act of 1862 and the Treaty of 1860, and the argument made on the other side that statutes without negative words will not repeal existing statutes, &c., has no application. The particular statute here applicable to this case is the act of 1862, which deals specially and particularly with the right of way which it confers. This particular provision controls the general provision in the treaty of 1860, which was not availed of in this case, and really has no application to it.

It answers this claim to recover the value of the right of way in question to say that Congress granted the right of way for the considerations specified in the Pacific Railway Acts, **and agreed specifically to extinguish all conflicting or interfering Indian titles. It says it extinguished this Indian title and claim. If so, it simply kept its contract with the Railroad Company, and is estopped to base thereon a claim to recover of the Company the money it paid to fulfill its own obligation to the Company on this behalf.**

Other considerations leading to this conclusion are so well put in Mr. WILLIAMS' brief that I do not deem it necessary to enlarge upon them here.

## III.

### If the government's theory of this case is right the statute of limitations is a complete bar.

The government's case is founded upon the fiction that it was in respect of such price the surety of the railroad company.

Clearly, the railroad company never made the government its surety. That any such relation existed is purely notional.

If the government was a trustee in respect of this money, it was a trustee simply for the individual owners of the improvements and the individual owners of the allotted lands through which the right of way ran; and, if it could have maintained a suit for the right of way before it paid the money to the Indians, the suit would have been for the exclusive benefit of the particular Indians entitled. The government afterwards paid the money to the Indians voluntarily, and without any request from the railroad company, and long after it had been adjudged by the Supreme Court of Kansas that the company had an absolute and complete title to its right of way under the act of 1862.

It is true that in a court of law a plea of the statute of limitations is not generally a bar to an action by the government. It is equally as true that, where the government is a mere nominal plaintiff, and the action is brought in its name to enforce the rights of individuals, and no interest of the government is involved, the defense of laches and limitation is available against the government. So, in actions brought by the United

States on behalf of private persons; as, for example, to cancel patents issued for lands, although to correct a mistake of the Land Department.

*Curtner vs. United States, 149 U. S., 662.*
*United States vs. Des Moines, &c., Co., 142 U. S., 510.*
*United States vs. Beebe, 127 U. S., 338.*
*And other cases to the same effect.*

JOHN F. DILLON,
A. L. WILLIAMS,
HARRY HUBBARD,
For the Defendants in Error.

No. 652.

# United States Circuit Court of Appeals,

EIGHTH CIRCUIT.—MAY TERM, 1895.

UNITED STATES OF AMERICA, *Plaintiff in Error*,
*vs.*
THE UNION PACIFIC RAILWAY COMPANY AND S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, F. R. COUDERT AND JOHN W. DOANE, AS RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY, *Defendants in Error*.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

## ARGUMENT OF DEFENDANTS IN ERROR.

THE statement of facts by the United States District Attorney is accurate, so that it need not be repeated here, except for the purpose of supplying two omissions, namely:

*First*—That the third count in the petition (which is not pressed here) was dismissed in the court below, as the journal entries will show. (See pages 17 and 18 of the Record.)

*Second*—The exhibits, which are not printed in the record, will show, and Mr. Perry will admit, that the right-of-way in question here is entirely upon the line of The

Union Pacific Railroad between Kansas City, Missouri, and Lawrence, Kansas, and none of it is on the line between Lawrence and Leavenworth. The materiality of this will be made apparent when I present my views upon the question of the right-of-way, for which the Government demands compensation.

While there are several questions raised by the record and argued by counsel for the Government, I shall content myself with presenting only two, with an incidental mention of the others.

These are.

*First* — ARE THE DEFENDANTS LIABLE TO THE GOVERNMENT FOR THE RIGHT-OF-WAY MENTIONED BETWEEN LAWRENCE AND KANSAS CITY?

*Second* — ARE THE DEFENDANTS LIABLE TO THE GOVERNMENT FOR THE IMPROVEMENTS OF THE DELAWARE INDIAN LANDS SOLD TO THE LEAVENWORTH, PAWNEE & WESTERN RAILROAD COMPANY BY VIRTUE OF THE TREATY OF MAY 30TH, 1860, AND THE AMENDMENT THERETO OF JULY 1ST, 1860?

For convenience, I will examine the second question first, namely:

Whether the Railroad Company is liable to the Government or to the Indians for the improvements on their land sold to The Leavenworth, Pawnee & Western Railroad Company. And for the purpose of this discussion I will admit that the defendant company is the successor to

the Leavenworth, Pawnee & Western, under full obligation to carry out the terms of the sale of the reservation.

An inspection of the treaty will at once convince the court that there was no thought either in the mind of the Government or of the Indians, that the improvements should be paid for separately by the Railroad Company, nor in fact was there any provision for the appraisement of such improvements. In 1854, the Government, by treaty with the Delaware Indians, agreed that at any time in the future, when the Indians so desired, their land should be set apart in severalty to their members. In pursuance of this treaty, in 1860 a new treaty was made at the request of the Delawares, and that is the treaty in question. A copy of this treaty will be found in the Appendix.

It was in fact worked up by the promoters of the Kansas Company for the purpose of obtaining the surplus lands of the Indians for speculative purposes. By that treaty the Indians asked the Government to set apart for each member of the tribe, eighty acres of land, and to sell the surplus to the Kansas Company at a price, not less than $1.25 per acre, to be determined by three appraisers appointed for that purpose.

There were some few improvements, such as Indians make, upon some of the lands, which would of necessity fall within the limits of the land sold to the Company, and it was deemed right that the Indians who thus lost their

improvements should either have their money value or like improvements upon the lands set apart to them in severalty. It was proper, of course, that individual improvements, which were sold for the benefit of the common fund, should be made good out of that fund. Hence the provision in section 2 of the treaty, that "The improvements of the Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building other improvements for them on the lands retained."

It will thus be seen that the Government had two different duties to perform:

First, to see that the Railroad Company paid to the Indians the full value of the land, which of course included the improvements, and that such value should be ascertained by the formality of an appraisement, through appraisers duly appointed for that purpose. When this appraisement was made and the value of the lands thus ascertained, the Railroad Company, upon payment of the appraised value, was entitled to the lands subject to the conditions contained in the treaty, and was in nowise interested in the distribution of the funds arising from such sale.

When the money was received by the United States, however, a new duty devolved upon it, and that was the duty pointed out in the provision just quoted, viz.: To

ascertain the value of individual improvements and to deduct from the gross sum received from the sale, such a sum as would compensate the Indians for their improvements or procure for them others of like value.

It is immaterial that a separate appraisement was made of these improvements. The treaty neither provided for nor contemplated any formal appraisement in this matter, but simply made it the duty of the United States in any informal manner it might choose, and through any agency it might select, to arbitrarily determine the value of these improvements, and withhold from the common fund the amount thus ascertained. The Railroad Company was in nowise interested in this matter. When the appraisement was made it was ascertained that the Company could not pay cash for the lands as the treaty originally provided, and Mr. Lincoln, then President, assumed the right to change the terms, and accepted the mortgage bonds of the Company in lieu of cash. These bonds were for the appraised value of the land, and when received by the agent of the United States, duly appointed for that purpose, and that fact was shown to the President, he issued his proclamation declaring the terms of the treaty to have been fully complied with. A copy of this proclamation will be found in the Appendix.

This whole matter was finally concluded October 4, 1861, and no living man ever thought or claimed that the Railroad Company was required to pay a separate sum for

these improvements until the 13th of July, 1892, when some Indian lobbyist on the outside, and a demagogue inside, of Congress, conceived the idea of attempting to saddle this claim upon the Railroad Company.

If the United States, under the plain provisions of the treaty, failed to retain from the common fund the value of individual improvements, it is its own fault, and it has no right to saddle such a claim upon the Railroad Company.

**ARE THE DEFENDANTS LIABLE TO THE GOVERNMENT FOR THE RIGHT-OF-WAY MENTIONED, BETWEEN LAWRENCE AND KANSAS CITY?**

Section 2, of the act of Congress of July 1st, 1862, (12 Stats. at Large, 489,) granted to the road a right-of-way through the public lands to the extent of 200 feet in width on each side of the track, and the United States agreed to extinguish as rapidly as may be, the Indian titles to all lands falling under the operation of the act and required for the right-of-way for the road. This grant was unconditional, and was essential to the building of the road. There is no reason to assume that the Government had in fact simply granted lands held by unsettled Indians, because there were no such lands on the line of the Company's road. On the other hand, unless it meant Indian reservations, the grant was useless and unnecessary, because upon the entire line of the Kansas Pacific as therein designated, the only Indian lands were the Delaware and Pottawatomie reservations, which were identical

in their legal status. So that it is fair to assume that these were the identical reservations through which the Government granted a right-of-way, and agreed, at its own expense, to extinguish the Indian titles as soon as it could. It violated no treaty obligation by this action, but if it had it would not have invalidated the grant. The Indian title is merely one of occupation, until in pursuance of treaties the lands have been allotted in severalty, and patents issued therefor, and the Government unconditionally has the power to grant a right-of-way through any Indian reservation upon such conditions as it sees fit. Whether it shall make proper compensation is a question of morals, and not of law. It had the power to make the grant, and exercised it in this case.

The argument need not rest here, however. By express terms of the treaty of 1854, the right to take and use a right-of-way through the reservation, upon proper compensation being made, was granted by the Delawares, and when Congress made a free grant of the right-of-way to the Union Pacific through these lands and agreed to extinguish the Indian title thereto, it was an assumption on the part of the United States of the obligation thereby created

This question has been settled in the elaborately considered case of *Grinter v. Kansas Pacific Railway Company*, 23 Kansas, page 642, in an opinion which was concurred in by Justice BREWER, now of the United States Supreme Court, and then a Justice of the Supreme Court of Kansas,

and the decision was afterwards affirmed by Mr. Justice Brewer, sitting as United States Circuit Judge of the District of Kansas, in the case of *Union Pacific Railway Company v. Shannon.* This last-mentioned case was never reported, but we have attached to this brief the memorandum of opinion filed by Judge Brewer in that case.

In the former case the facts were, briefly, that Grinter, who was a Delaware Indian by adoption and the husband of the Indian woman to whom the lands in question were allotted, brought suit against the Union Pacific for several thousand dollars' damages for trespass upon this land. It was admitted that the Union Pacific had never paid for the right-of-way, and it based its title solely upon the grant from Congress of the right-of-way hereinbefore mentioned. The court, after elaborate consideration of the case, decided that the grant in question covered the right-of-way through the allotted lands of the Delaware Reservation, without compensation from the Railroad Company, and that the obligation to pay for the same, if there was any, rested upon the United States. The opinion of the court is so strong and conclusive that I shall quote therefrom at some length:

"On the part of the plaintiff, it is claimed that the Government cannot extinguish the general Indian title by mere Congressional grant; that the provision of the act of July 1, 1862, for the extinguishment of the Indian titles to all the lands required for the right-of-way of the various railroad companies therein named, had reference solely to

the territory occupied by wild or blanket Indians, and not to reservations secured by treaty, and occupied by Indians partially or wholly civilized; and, finally, that a grant of a right-of-way for the road of the defendant over any portion of the lands allotted to the Delawares in severalty without the payment of just compensation therefor, would involve such a gross breach of the public faith, that the presumption is conclusive that Congress never meant to grant it.

"On the other hand, the defendant contends that Congress had the exclusive right and dominion over the entire Delaware reserve, and that by virtue of such right, it had the authority to permit the entry and the construction of the defendant's road, either with or without compensation to be paid by the company; that as the road, in the way prescribed by Congress, was to be constructed necessarily through the Delaware and Pottawatomie reservations, and as these were the only Indian lands between the mouth of the Kansas river on the east side to its junction with the Union Pacific road, reservations secured by treaty were as much included in the grant as the territory of the wild tribes, for if the grant was not through the Delaware and Pottawatomie reservations, there was no grant of right-of-way whatever to defendant through these reservations; that in brief, the grant of 1862 overrides all treaties prior and subsequent, even to the extent, if necessary, of violating treaty stipulations.

"We have had occasion very recently to examine quite fully the question of Indian titles in the case of *Veale v. Maynes*, ante, p. 1. In accordance with the uniform decisions of the Supreme Court of the United States, we there decided that allotments to Indians upon Indian reservations must be construed in the light of the recognized relations between the Government and the Indians, and the established policy of the former toward the latter;

that *title* does not necessarily mean title in fee simple; that it may mean any kind of title, even the mere title by occupancy; that the Indian title has been constantly recognized as simply this inferior title; that the Government has uniformly asserted its holding of the fee, and has recognized the Indian right as only one of possession. In that case, the Pottawatomie treaties of 1846, 1861, and 1867 were before us for interpretation, and the words 'possession and title,' and 'to guarantee the full and complete possession . . . as their land and home forever,' employed in the treaty of 1846, to characterize the estate granted to the Pottawatomies, were certainly as strong, if not stronger, than any of like import used in the Delaware treaty of 1860. We conclude, therefore, that there is nothing in or about the treaty of 1860 to indicate that any other right or title was granted to the allottees or assignees, or their heirs, by the stipulations of articles 1 and 2, than the right of occupancy, with the ultimate fee of the land vested in the United States. With this result obtained, it logically follows that Congress had the power to make the grant contained in section 2 of the act of July 1, 1862, if it really meant that the grant should include rights-of-way through reservations secured by treaty. (*Rld. Co. v. United States*, 92 U. S. 733, 744.) The act of Congress of March 3, 1863, donating lands to aid in the construction of certain railroads in Kansas, granted the right-of-way through reserved lands for these roads, and while the Supreme Court of the United States has held that the act did not dispose of the Osage lands to the railroad companies, no one has yet, as we are aware, questioned the grant for the right-of-way through the ceded or reserved lands.

"In the last clause of section 2, the United States agreed to extinguish as rapidly as might be the Indian titles falling under the operation of the act, and required for the right-of-way. The language is broad and comprehensive, and not restricted to the territory of wild tribes. The only

Indian lands upon the line of defendant's road were reservations secured by treaty. It was either a grant to the defendant through these Indian lands, as well said by counsel, or it was no grant to it through any Indian lands. By the act of 1862, the company, which the defendant succeeded, was required to file an acceptance of its provisions within six months after its passage, and to complete one hundred miles of its road, commencing at the mouth of the Kansas river, within two years thereafter; so, immediate and urgent action was demanded. If the grant did not include the Delaware reservation, all attempts to construct a road west from the mouth of the Kansas river over the reservation must have been suspended until arrangements were completed with the allottees on the lands. This would have been an insuperable obstacle to laying out a right-of-way, and constructing the road. The lands were withdrawn from the operation of the State laws, and neither the charter of the company nor the general laws of the State could be resorted to for power to condemn them.

"The company had no authority to exercise the right of eminent domain within the reserve; and without the power and obligation of the United States to extinguish for its benefit and use the Indian title for a right-of-way, it can hardly be supposed that the company would have assented to the conditions of the act of 1862, or attempted afterward the construction of its road over and across these Indian lands. Under all the circumstances, we think that within the meaning and scope of the act of 1862, the purpose of Congress was to permit the entry and the construction of the road of the Leavenworth, Pawnee & Western Railroad Company through the reservation without compensation on the part of the company. This view seemingly requires us to consider the objection, whether such a grant would not involve a breach of public faith with the Delaware allottees, over whose land the right-of-way of the road was located. While this question may

not absolutely affect the power of Congress in the premises, yet we cannot well assume that there was any intention by the adoption of the act of 1862 to violate treaty obligations. Previous to the passage of the act, the treaty of 1860 had been duly concluded and proclaimed. Special provision had been made in article 3 for a perpetual right-of-way over the lands allotted to the Delawares in severalty for the Leavenworth, Pawnee & Western Railroad Company on the payment of a just compensation in money to the respective parties whose lands were to be crossed by the line of railroad. This was an agreement between the United States and the Delawares, to which the latter company was not a party, and it could not obtain the benefit of the contract except by permission of Congress. By the act of 1862 the Leavenworth, Pawnee & Western Railroad Company became an associated enterprise of the Union Pacific Railroad Company. The general history of the legislation of Congress in reference to this national undertaking for national purposes, and the policy of the Government respecting the same, need not be stated here at length, as they are forcibly set forth by Mr. Justice Davis, speaking for the court, in the case of *The United States v. The Union Pacific Rld. Co.*, 91 U. S. 72.

"Therefore it is sufficient to say that Congress undertook to enlist private capital and enterprise in the construction of the system of the Pacific railroads when a war of rebellion was in progress and the life of the nation was in imminent peril, and agreed to aid the companies having charge of the construction of the roads on account of the supposed advantages — military, postal and otherwise — which the public would derive from the completion of the projected railways. The Delawares had stipulated that the Leavenworth, Pawnee & Western Railroad might have a right-of-way through their reservation upon compensation being paid. The United States agreed to extinguish the

Indian titles for the right-of-way of the Pacific roads as an additional aid to the enterprises, and to induce their early construction. The Leavenworth, Pawnee & Western Railroad was incorporated into the system, and the United States assumed the obligation to give it the right-of-way through the Delaware reservation. This it could do within the exact terms of the treaty of 1860, by paying the Delaware allottees just compensation therefor. Whether such allottees have made demand of the Government for this compensation, we are not advised; clearly, the Government, and not the defendant, if anyone, owes the compensation. With this construction and interpretation of the treaty of 1860 and the act of Congress of 1862, all is harmony. The Indians are fully protected in their treaty guaranties, and the railway company is protected and secured in its right-of-way over the Indian lands."

The suggestion that the decision of the court in the Grinter case was *obiter dicta* is a rather curious one, to say the least, in view of the fact that the only question argued and the only one decided, and the only one upon which a decision was desired, was, whether the Government had granted, free of charge, a right-of-way through the Delaware Indian Reservation to the Kansas Pacific Railroad. It is true, the court decided that Grinter could not maintain his action, because he was not a member of the tribe; but it is also true that other cases were pending in which the plaintiffs were members of the tribe, as will be seen by the case immediately following the Grinter case, in 23d Kansas, page 659.

**THE LINE OF THE KANSAS PACIFIC UPON THE RIGHT-OF-WAY IN QUESTION WAS NOT THE LEAVENWORTH, PAWNEE & WESTERN OR ITS SUCCESSOR, BUT WAS AN INDEPENDENT CORPORATION CREATED SOLELY BY CONGRESS.**

It has been so commonly assumed that the road in question was created by the Territorial Legislature of Kansas and not by Congress, that the question requires some examination. When the Pacific railroads were being incorporated there was a general desire to have either the main line or one of the branches thereof constructed through Kansas, and a main line was finally located through Nebraska, chiefly because it was then in a territorial condition, and a branch line provided to be built through Kansas. There were in Congress at the time, several gentlemen, loyal to the Government, but imbued with an extraordinary and tenacious faith in the doctrine of State rights; conspicuous among them being Hon. Lyman Trumbull, of Illinois. They had conscientious doubts about the power of Congress to incorporate a railroad within the limits of a State. A great majority of the members of Congress had no such doubts, but deferred quite largely to those gentlemen for the purpose of expediting legislation to secure what was then believed to be absolutely necessary for the retention of our possessions upon the Pacific coast. This extraordinary deference to the States is shown occasionally in the Pacific railroad acts themselves, and is very conspicuous in the debates in Congress. It was by rea-

son of this feeling that an existing Kansas corporation was made the beneficiary of an entirely new charter granted by Congress, instead of individuals.

The Leavenworth, Pawnee & Western Railroad Company was a paper corporation of the Territory of Kansas, with authority to construct a railroad of any gauge, with any weight of rail, via any points it might select, from a point *in* the town of Leavenworth to the western limits of the Territory of Kansas, which was then the summit of the Rocky Mountains. It had no authority, however, to construct a road to or from a point at the mouth of the Kansas river, on the south side thereof. It was, however, essential, in the view of Congress, that the Pacific Railroad should start from the south side of the Kansas river. In view of the fact that there was an existing Territorial corporation whose chartered line was for a certain distance the same as that desired by Congress, it was deemed wise to confer a corporate franchise of the United States upon its company to build the road designed and incorporated by Congress. The fact that an existing railway corporation was chosen as grantee of this franchise has led to all the confusion in relation thereto; though the grant would have been as effective if Congress had named a soap factory as a railroad. It was in fact the same in effect, though it avoided the scruples of Senator Trumbull and others, as if Congress had created an entirely new corporation, as it did, and had conferred the same upon the

individual directors of the Leavenworth, Pawnee & Western by name.

The Leavenworth, Pawnee & Western was authorized by Kansas to construct *its* railroad from a point in Leavenworth to the western limit of the Territory. Congress conferred a franchise upon the Leavenworth, Pawnee & Western, authorizing it to construct *a* railroad — not *its* railroad, but *a* railroad — from the mouth of the Kansas river, on the south side thereof, to the point of junction with the main line of the Union Pacific in the Territory of Nebraska. The Leavenworth, Pawnee & Western could establish the gauge of its road at its own will. The gauge of the road incorporated by Congress was established by the act incorporating it. The Kansas company could use any size, quality or weight of material it chose. The Congressional company had to use such as the President prescribed. The Kansas company was not compelled to reach any town in Kansas on its route, but had merely prescribed its terminal points. The Congressional road was compelled by law to go via Topeka and Lawrence, and the history of this latter provision abundantly shows not only that the Kansas Pacific was a Federal corporation, but that Congress and the State of Kansas both recognized that fact. If it had been a Territorial corporation, its charter was a contract which the Legislature of Kansas itself could not alter, and with which most certainly, Congress had nothing to do. Knowing, however, that it was a Federal

corporation, subject to the exclusive control of Congress, the Legislature of Kansas, on the 18th day of March, 1864, addressed a memorial to Congress asking it to compel the building of the road via Lawrence and Topeka; and in compliance with that memorial, Congress, in 1864, amended the Pacific act so as to require the construction of the roads via these points.

The Kansas road could build only to the western limit of the Territory. The Kansas Pacific was compelled to build through the north line of the State. The Kansas company's authority would, of course, end at the line of the State. The Kansas Pacific Company, created by Congress, could build into the then Territory of Nebraska; and there was, moreover, a provision that when the point of junction was reached, if the main line was not being in good faith constructed, the Kansas Pacific was authorized to continue its road to the junction of the Central Pacific of California, and thus become the main line of the Union Pacific. It seems too obvious to require argument, that Congress never intended that a great national road which might become the main line of the Pacific System, should be and remain a Kansas corporation, subject to the control of the State rather than of the Nation.

There are a great many other provisions, to which attention will be called in the oral argument, showing, I think conclusively, that this is a Federal and not a State corporation, and that the grant of the right-of-way from

the Delaware Reservation is in nowise affected by any treaty provisions in regard to the right-of-way of the Leavenworth, Pawnee & Western. If this is so, the court will see the materiality of the fact that the right-of-way in question is exclusively that occupied by the road from Kansas City to Lawrence, and not by the road between Lawrence and Leavenworth, which latter road, for the purposes of argument, I have always been willing to concede was the Leavenworth, Pawnee & Western road, though in fact it also is a Federal corporation.

A. L. WILLIAMS,

*Solicitor for Defendants in Error.*

# APPENDIX.

## TREATY BETWEEN THE UNITED STATES AND THE DELAWARE TRIBE OF INDIANS.

CONCLUDED MAY 30, 1860—RATIFIED AUGUST 22, 1860.

### A PROCLAMATION BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

*To all and singular to whom these presents shall come, Greeting:*

WHEREAS a treaty was made and concluded at Sarcoxieville, on the Delaware reservation, on the thirtieth day of May, eighteen hundred and sixty, by Thomas B. Sykes, as commissioner on the part of the United States, and the chiefs and headmen of the Delaware tribe of Indians hereinafter mentioned, which treaty is in the following words, to wit:

"ARTICLES OF AGREEMENT AND CONVENTION, made and concluded at Sarcoxieville, on the Delaware reservation, this thirtieth day of May, one thousand eight hundred and sixty, by Thomas B. Sykes, as commissioner on the part of the United States, and the following named chiefs of the Delaware tribe of Indians, viz: John Connor, head chief of the whole tribe; Sarcoxie, chief of the Turtle band; Ne-con-he-con, chief of the Wolf band; Rock-a-to-wha, chief of the Turkey band, and assistants to the said head chief, chosen and appointed by the people, and James Connor, chosen by the said chiefs as delegate.

"ARTICLE 1. By the first article of the treaty made and concluded at the city of Washington, on the sixth day of

May, one thousand eight hundred and fifty-four, between George W. Manypenny, commissioner on the part of the United States, and certain delegates of the Delaware tribe of Indians, which treaty was ratified by the Senate of the United States on the eleventh day of July, one thousand eight hundred and fifty-four, there was reserved, as a permanent home for the said tribe, that part of their country lying east and south of a line beginning at a point on the line between the Delawares and Half-breed Kansas, forty miles in a direct line west of the boundary between the Delawares and Wyandottes; thence north ten miles; thence in an easterly course to a point on the south bank of Big Island creek, which shall also be on the bank of the Missouri river, where the usual high-water line of said creek intersects the high-water line of said river. And by the eleventh article of said treaty it was stipulated that 'at any time hereafter when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their permanent home to be surveyed in the same manner as the ceded country is surveyed, and may assign such portion to each person or family as shall be designated by the principal men of the tribe: *Provided*, such assignments shall be uniform.'

"The Delawares having represented to the government that it is their wish that a portion of the lands reserved for their home may be divided among them in the manner contemplated by the eleventh article of the treaty aforesaid, it is hereby agreed by the parties hereto, that the said reservation shall be surveyed as early as practicable after the ratification of these articles of agreement and convention, in the same manner that the public lands are surveyed; and to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres, to include in every case as far as practicable, a reasonable proportion of timber, to be selected according to the legal subdivisions of survey.

"ART. 2. The division and assignment in severalty among the Delawares of the land shall be made in a compact body, under the direction of the Secretary of the Interior, and his decision of all questions arising thereupon shall be final and conclusive.

"Certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned respectively, and that the said tracts are set apart for the exclusive use and benefit of the assignees and their heirs. And said tracts shall not be alienable in fee, lease, or otherwise disposed of, except to the United States or to members of the Delaware tribe, and under such rules and regulations as may be prescribed by the Secretary of the Interior; and said tracts shall be exempt from levy, taxation, sale, or forfeiture, until otherwise provided by Congress.

"Prior to the issue of the certificates aforesaid, the Secretary of the Interior shall make such rules and regulations as he may deem necessary and expedient respecting the disposition of any of said tracts, in case of the death of the person or persons to whom they may be assigned, so that the same shall be secured to the families of such deceased persons. And should any of the Indians to whom tracts shall be assigned, abandon them, the said Secretary may take such action in relation to the proper disposition thereof, as, in his judgment, may be necessary and proper.

"The improvements of the Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building other improvements for them on the lands retained.

"ART. 3. The Delaware tribe of Indians, entertaining the belief that the value of their lands will be enhanced by having a railroad passing through their present reserva-

tion, and being of the opinion that the Leavenworth, Pawnee and Western Railroad Company, incorporated by an act of the Legislative Assembly of Kansas Territory, will have the advantage of travel and general transportation over every other company proposed to be formed which will run through their lands, have expressed a desire that the said Leavenworth, Pawnee and Western Railroad Company shall have the preference of purchasing the remainder of their lands after the tracts in severalty and those for the special objects herein named shall have been selected and set apart, upon the payment into the United States treasury, which payment shall be made within six months after the quantity shall have been ascertained, in gold or silver coin, of such a sum as three commissioners, to be appointed by the Secretary of the Interior, shall appraise to be the value of said land: *Provided*, in no event shall the value be placed below the sum of one dollar and twenty-five cents per acre, exclusive of the cost of survey of the same. [And that the United States will issue a patent in fee-simple to said company, upon the payment as aforesaid, for all their land remaining in Kansas.] It is, therefore, agreed by the United States that the wishes of the Delawares shall be granted; that they will accept of the trust reposed upon them; and that the money resulting from such disposition of the lands shall be disposed of and applied in the manner provided for by the seventh and eighth articles of the Delaware treaty of sixth May, one thousand eight hundred and fifty-four, after expending a sufficient sum to enable them to commence agricultural pursuits under favorable circumstances. It is also agreed that the said railroad company shall have the perpetual right of way over any portion of the lands allotted to the Delawares in severalty, on the payment of a just compensation therefor, in money, to the respective parties whose lands are crossed by the line of railroad.

"ART. 4. Whereas some years ago a good many of the

Delawares went down among the Southern Indians, and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation, and in every respect to be governed by the same rules and regulations as prescribed for the government of the lands reserved by the preceding articles, that until they return the allotments set apart for them belong to the nation in common.

"ART. 5. There shall be reserved three hundred and twenty acres of ground where the mill, school-house, and Ketchum's store now stand; three hundred and twenty acres where the council-house now is; one hundred and sixty acres where the Baptist mission now is; one hundred and sixty acres where the agency house now is; forty acres where the Methodist Episcopal Church South now is; forty acres where the Methodist Episcopal Church North now is; which several tracts, with improvements thereupon, shall be disposed of when the objects for which they have been reserved shall have been accomplished, in such manner and for such purposes as the Secretary of the Interior shall determine to be just and equitable, for the benefit of the Delawares.

"ART. 6. By article fourteen of the treaty between the Delawares and the United States, of May six, eighteen hundred and fifty-four, ratified by the Senate, July eleven, eighteen hundred and fifty-four, the United States bound herself to protect them and their rights; and that whereas, that depredations of various kinds have been committed upon them and their lands, it is hereby agreed that the United States shall pay them, within twelve months from the ratification of these articles of treaty and convention, thirty thousand dollars as indemnity for timber that has been cut off their reservation by the whites, and nine thou-

sand five hundred dollars as indemnity for ponies and cattle that have been stolen from them by the whites since their last treaty with the United States. It is further stipulated that should the Senate of the United States refuse this article, it shall in nowise affect the validity of the other articles, or prejudice the right of the Delawares to appeal to the Congress of the United States for the indemnities hereby agreed upon.

"It is further understood that at the treaty between the Delawares and the United States, made September twenty-four, eighteen hundred and twenty-nine, the boundary of the reservation then set apart for them included the Half-breed Kansas lands; but it afterwards proved that the United States had previously set apart these lands for the Half-breed Kaws, and by that means they have been kept out of the use and benefit of said lands; it is, therefore, hereby agreed that a fair valuation shall be made by the United States upon such lands, under the direction of the Secretary of the Interior, and that the amount of said valuation shall be paid to the Delawares.

"ART. 7. In consideration of the long and faithful services of the chiefs of the Delaware nation, and of their interpreter, who is also a member of the nation, it is further agreed that the said chiefs and interpreter shall have allotted to each a tract of land, to be selected by themselves, and shall receive a patent in fee-simple therefor from the President of the United States, viz: John Connor, principal chief, six hundred and forty acres; Sar-cox-ie, chief of the Turtle band, three hundred and twenty acres; Rock-a-to-wha, chief of the Turkey band, three hundred and twenty acres; Ne-con-he-con, chief of the Wolf band, three hundred and twenty acres; and Henry Tiblow, interpreter, three hundred and twenty acres; the lines of each tract to conform to the legal subdivisions of survey. It is further agreed that, from the money as paid the Delaware tribe of Indians, in accordance with article number

ten of this treaty, the chiefs of said tribe of Indians shall appropriate one thousand five hundred dollars as the annual salary of the councilmen of the said tribe of Indians.

"ART. 8. Any stipulation in former treaties inconsistent with those embraced in the foregoing articles shall be of no force or effect.

"ART. 9. As these articles are entered into for the sole use and benefit of the Delaware Indians, it is understood that the expenses incident to carrying them into effect shall be defrayed from the funds of said Indians, held in trust for them by the United States.

"ART. 10. The interest accruing to the Delawares under the former treaties, and that which may accrue under this, shall be paid on the first of April and October in each year.

"In testimony whereof, the said Thomas B. Sykes, commissioner as aforesaid, and the said delegates of the Delaware tribe of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

"THOMAS B. SYKES, [SEAL].
*Commissioner.*

JOHN CONNOR, his + mark. [SEAL.]
*Head Chief.*

SAR-COX-IE, or The Highest,
his + mark. [SEAL.]
*Assistant Chief.*

NE-CON-HE-CON, or Bounding Ahead,
his + mark. [SEAL.]
*Assistant Chief.*

ROCK-A-TO-WHA, or Sun Rise,
his + mark. [SEAL.]
*Assistant Chief.*

JAMES CONNOR, or Ah-la-a-chick,
his + mark. [SEAL.]

"Signed in the presence of —

HENRY TIBLOW, *United States Interpreter.*
JAMES FINLAY.
WILLIAM G. BRADSHAW.
SAMUEL PRIESTLY.
THOMAS S. GLADDING."

And, whereas, the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the twenty-seventh of June, one thousand eight hundred and sixty, advise and consent to the ratification of the same, by a resolution and with an amendment in the words and figures following, to wit:

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES, June 27, 1860.

"*Resolved*, (two-thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the 'Articles of agreement and convention made and concluded at Sarcoxieville, the thirtieth day of May, eighteen hundred and sixty, by Thomas B. Sykes, commissioner on the part of the United States, and certain chiefs of the Delaware tribe of Indians,' with the following amendment:

"At the end of article third, add: It being the intent and meaning of the Delawares, in consenting to the sale of their surplus lands to said company, that they should, in good faith, and within a reasonable time, construct a railroad through their reservation, and to carry out this intent as well as to secure so great a public convenience, it is agreed that no patent shall issue for any of these lands, nor shall the sale be binding upon the Delaware Indians or the United States, until the Secretary of the Interior shall be fully satisfied that a line of twenty-five miles of the road from Leavenworth City shall have been completed and equipped, when a patent shall issue for one-half of the ascertained quantity. The patent for the residue shall issue only when the said Secretary shall be satisfied that the road has been in like manner completed and equipped to the western boundary of the Delaware reservation. And if the said company shall fail or neglect to construct either the first or second sections of the road, or having constructed the first section and fail to complete

the second section within a reasonable time, they shall forfeit to the United States all right to the lands not previously patented, and the certificate of purchase shall be deemed and considered canceled. *And provided further*, That in case the said company shall fail to make payment for the lands or fail to construct the road, as hereinbefore stipulated, within a reasonable time, the surplus lands shall be disposed of by the Secretary of the Interior, at public auction, in quantities not exceeding one hundred and sixty acres; but in no case for a sum less than the appraised value, the net proceeds to be applied in the same manner as hereinbefore specified: *And provided further*, That the said railroad company shall, finally, and in good faith, sell and dispose of all said lands within seven years after receiving the patent therefor, except what may be necessary for railroad purposes; and in default thereof so much thereof as may remain undisposed of shall revert to the Delaware nation, to be disposed of as is herein provided for other forfeited lands.

"Attest: ASBURY DICKINS, *Secretary.*"

And whereas the foregoing amendment having been fully interpreted and explained to the chiefs and headmen of the Delaware tribe aforesaid, they did thereunto, on the twenty-first day of July, one thousand eight hundred and sixty, give their free and voluntary assent in the words and figures following, to-wit:

"We the undersigned chiefs, councilors, and headmen of the tribe of Delaware Indians, on behalf of said tribe, now in full council assembled, having had fully explained to us the amendment made on the 27th day of June last, by the Senate of the United States, to the treaty made and concluded on the 30th of May last, at Sarcoxieville, on the Delaware reservation, by Thomas B. Sykes, commissioner on the part of the United States, and the following named chiefs of the Delaware tribe of Indians, viz: John Con-

nor, head chief of the whole tribe; Sar-cox-ie, chief of the Turtle band; Rock-a-to-wha, chief of the Turkey band, and assistant to the said head chief, chosen and appointed by the people; and James Connor, chosen by the said chiefs as delegate, which amendment is in the following words, viz:

"AMENDMENT.

"At the end of article 3 add: It being the intent and meaning of the Delawares, in consenting to the sale of their surplus lands to said company, that they should, in good faith, and within a reasonable time, construct a railroad through their reservation, and to carry out this intent, as well as to secure so great a public convenience, it is agreed that no patent shall issue for any of these lands, nor shall the sale be binding upon the Delaware Indians nor the United States until the Secretary of the Interior shall be fully satisfied that a line of twenty-five miles of the road from Leavenworth City shall have been completed and equipped, when a patent shall issue for one-half of the ascertained quantity. The patent for the residue to issue only when the said Secretary shall be satisfied that the road has been in like manner completed and equipped to the western boundary of the Delaware reservation. And if the said company shall fail or neglect to construct either the first or second sections of the road, or having constructed the first section and fail to complete the second section within a reasonable time, they shall forfeit to the United States all right to the lands not previously patented, and the certificate of purchase shall be deemed and considered cancelled. *And provided further*, That in case the said company shall fail to make payment for the lands, or fail to construct the road, as hereinbefore stipulated, within a reasonable time, the surplus lands shall be disposed of by the Secretary of the Interior at public auction, in quantities not exceeding one hundred and sixty acres; but in

no case for a sum less than the appraised value, the net proceeds to be applied in the same manner as hereinbefore specified. *And provided further*, That the said railroad company shall finally and in good faith sell and dispose of all said lands within seven years after receiving the patent therefor, except what may be necessary for railroad purposes; and in default thereof, so much thereof as may remain undisposed of shall revert to the Delaware nation, to be disposed of as is herein provided for other forfeited lands, do hereby accept and consent to the said amendments to the articles of agreement and convention aforesaid, and agree that the same shall be considered as a part thereof.

"In testimony whereof, we have hereunto set our hands and affixed our seals, this twenty-first day of July, anno Domini 1860.

"JOHN CONNOR, his + mark. [SEAL.]
*Head Chief.*

SAR-COX-IE, his + mark. [SEAL.]
*Chief of Turtle Band.*

NE-CON-HE-CON, his + mark. [SEAL.]
*Chief of Wolf Band.*

ROCK-A-TO-WHA, his + mark. [SEAL.]
*Chief of Turkey Band.*

JAMES CONNOR, his + mark. [SEAL.]
*Delegate.*

"Witness—

HENRY TIBLOW, *United States Interpreter.*
THOMAS S. GLADDING.
SAMUEL PRIESTLY.
WM. G. BRADSHAW.

"I do hereby certify that the foregoing instrument of writing was fully explained by me to the Delaware tribe of Indians in council assembled in the day and year last above written, and that they did accept and consent to the

said foregoing instrument of writing, and subscribed their names and affixed their seals thereto in my presence.

"Given under my hand this twenty-first day of July, one thousand eight hundred and sixty.

THOS. B. SYKES,
*U. S. Agent for the Delawares.*"

Now, therefore, be it known that I, James Buchanan, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the twenty-seventh of June, eighteen hundred and sixty, accept, ratify and confirm said treaty with the amendment as aforesaid.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

Done at the city of Washington, this twenty-second day of August, in the year of our Lord one thou-
[L. S.] sand eight hundred and sixty, and of the independence of the United States the eighty-fifth.

JAMES BUCHANAN.

By the President:

WM. HENRY TRESCOT, *Acting Sec'y of State.*

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## ABRAHAM LINCOLN,

PRESIDENT OF THE UNITED STATES OF AMERICA.

*To all and singular to whom these presents shall come, Greeting:*

WHEREAS, a Treaty or Agreement was made and concluded at Leavenworth City, Kansas, on the second day of July, one thousand eight hundred and sixty-one, between the United States of America and the Delaware Tribe of Indians, relative to certain lands of that tribe conveyed to the Leavenworth, Pawnee and Western Railroad

Company, and to bonds executed to the United States by the said company for the payment of the said Indians, which treaty or agreement, with the preliminary and incidental papers necessary to the full understanding of the same, is in the following words, to wit:

"WHEREAS, by the treaty of May 30, 1860, between the United States and the Delaware tribe of Indians, it is provided that the surplus lands of said Delawares, not included in their 'home reserve,' should be surveyed and appraised under the direction of the Secretary of the Interior; and that in order to aid in the construction of a railroad near and through their said 'home reserve,' the Leavenworth, Pawnee and Western Railroad Company of Kansas, duly organized and incorporated under the laws of said Territory, should have the right to purchase such surplus lands at such appraised value — on condition, however, that after paying for said lands said company should only receive title to one-half of them on completing and equipping, within a reasonable time, twenty-five (25) miles of said railroad from Leavenworth City westward; and should only receive title to remaining half of said lands on completing and equipping said road, within a reasonable time, to the western boundary of the 'Delaware Reserve;' and that in case said company shall fail to pay for said lands, or having paid should forfeit the same, or any part thereof, before receiving title, by failing to construct either the first or the second section of said road within such reasonable time, then the lands so forfeited, or not paid for, should be sold in quantities not exceeding one hundred and sixty (160) acres, at not less than such appraised value; the proceeds of such sale, subject to a certain contingent deduction, to be invested by the President of the United States in 'safe and profitable stocks' for the benefit of said Delaware Indians:

"And whereas said surplus lands, to the amount of 223,-$966\frac{78}{100}$ acres, have been duly surveyed and appraised at

an aggregate valuation of two hundred and eigthy-six thousand seven hundred and forty-two and $\frac{15}{100}$ ($286,742\frac{15}{100}$) dollars:

"And whereas the said Leavenworth, Pawnee and Western Railroad Company has executed, under their corporate seal, and by the hand of Thomas Ewing, Jr., their agent, their twenty-nine (29) several bonds, all of even date herewith, and numbered from one to twenty-nine, inclusive, for sums amounting in the aggregate to $\$286,742\frac{15}{100}$, being the amount of the valuation of said surplus lands as above stated, twenty-eight (28) of which said bonds are for the sum of ten thousand ($10,000) dollars each, and one is for the sum of six thousand seven hundred and forty-two $\frac{15}{100}$ ($86,742\frac{15}{100}$) dollars, and payable in ten (10) years after their date, at the office of the Assistant Treasurer of the United States, in the city of New York, to the Commissioner of Indian Affairs of the United States, or bearer, with interest at the rate of six per cent. per annum, payable annually at the same place on interest warrants attached to said bonds, which said bonds have been delivered by said company to Archibald Williams, Judge of the United States Court for the District of Kansas, and have been by him received and receipted for as agent of the United States for that purpose specially appointed, in accordance with the instructions of the President of the United States of June 10, 1861, hereto attached and made part hereof, and for the consideration and use in said instructions set forth:

"Now, therefore, to secure the payment of said bonds and every part thereof, and of all interest to become due thereon, according to the terms thereof, the Leavenworth, Pawnee and Western Railroad Company, by its agent hereto specially authorized by resolution of the Board of Directors of said company of April 11, 1861, a certified copy of which said resolution is hereto attached, hereby agrees with the United States, as trustee for said Dela-

ware tribe of Indians, that in case said company shall at any time hereafter neglect or fail to pay the whole or any part of the interest on all or any one of said bonds, or shall neglect or fail to pay the whole or any part of the principal of all or any one of said bonds, when any such payment, either of principal or of interest, shall become due and payable, then the said Railroad Company shall be deemed and held to have forfeited all right and title of any kind whatever to the one hundred thousand (100,000) acres of land herein described, to wit.

[Descriptions omitted.]

"And immediately on such failure the United States may take possession of and sell said lands for the exclusive benefit of said Delaware Indians.

"And in case said company shall forfeit the one hundred thousand (100,000) acres above described, it shall thereupon also forfeit all its right and title to all the lands purchased by it from said Indians, not earned and patented at the date of such forfeiture.

"And said company further agree that, on the completion of the first section of said road, it shall only be entitled to a patent for one-half of the lands not pledged for the payment of said bonds; and on the completion of said second section it shall have a patent for only the remaining half; and that no patent shall issue to it for any of the lands so pledged, until after said bonds and the interest warrants attached shall all and every part of them have been fully and promptly paid and cancelled.

"In witness whereof, the said Leavenworth, Pawnee and Western Railroad Company, by Thomas Ewing, Jr., their agent aforesaid, have executed this instrument and attached thereto the seal of said company, this 2d day of July, 1861. The Leavenworth, Pawnee and Western

[SEAL.] Railroad Company, by their agent,

THOMAS EWING, Jr.

"*State of Kansas,*
*Leavenworth county,* } ss.

"On this second day of July, A. D. 1861, before me the undersigned authority, a notary public in and for the county aforesaid, in the State aforesaid, personally came Thomas Ewing, Jr., Agent of the Leavenworth, Pawnee and Western Railroad Company, to me personally known to be the identical person who signed the foregoing instrument of writing, and whose name is thereto affixed as grantor, and he acknowledged the same to be his own voluntary act and deed.

Witness my hand and notarial seal, this
[SEAL.] 2d day of July, A. D. 1861.

W. S. VAN DOREN,
*Notary Public, Leavenworth county, Kansas.*

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"At a called meeting of the Board of Directors of the Leavenworth, Pawnee and Western Railroad Company, on Monday, July 1, 1861, at the office of A. J. Isacks, in Leavenworth City, Kansas, was present, Jas. C. Stone, Amos Rees, Thomas Ewing, Jr., and Thomas S. Gladding.

"*Resolved*, That Thomas Ewing, Jr., be authorized and directed, as agent of the company, to make, execute, and deliver to Archibald Williams, as Agent of the United States, the bonds and interest warrants of the company for $286,742.15, payable in ten years from their date, with six per cent. interest, payable annually, payable to the Commissioner of Indian Affairs, or bearer, at the office of the Assistant Treasurer of the United States in the city of New York; and also to make and execute to the United States, and cause to be recorded and delivered to said Williams, as such agent, a mortgage of the company on the one hundred thousand acres of Delaware Indian lands, described in the letter of the Commissioner of Indian Affairs to the Secretary of the Interior, of May 29, 1861; such mortgage to contain all the conditions prescribed in the

paper signed by the President of the United States, of June 10, 1861, the terms of which are hereby accepted by the company.

"I hereby certify that at a meeting of the Board of Directors of the Leavenworth, Pawnee and Western Railroad Company, held at the office of A. J. Isacks, in the city of Leavenworth, in the State of Kansas, on the 1st day of July, 1861, the foregoing proceedings were had and recorded on the journal of the company; and that the same is a true and correct transcript of the same from the journal of said company.

"In testimony whereof, I hereunto sign my name and affix the official seal of the company.

THOS. S. GLADDING,

[SEAL.] *Secretary L., P. & W. R. R. Co.*"

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"Whereas, by the treaty of Sarcoxieville, amended by the United States Senate, and finally ratified by the President of the United States on the 22d day of August, 1860, a principal object of both parties was the construction of a certain contemplated railroad therein named; and to that end the Leavenworth, Pawnee and Western Railroad Company were to pay into the United States Treasury, in gold or silver coin, a sum of money, afterwards ascertained to be $286,742.15, as the appraised value of certain lands in Kansas belonging to the Delaware tribe of Indians; which sum of money, after expending a sufficient part of it to enable the Indians to commence agricultural pursuits under favorable circumstances, was to be by the President, for said Indians, invested in safe and profitable stocks: And whereas the said railroad company is not able to pay said sum of money within time, according to said treaty; and whereas the President is of opinion that it is not for the interest of either party that said object of the treaty shall fail, but not knowing what would be the desire of

said Indians on this point, nor knowing whether any part of said sum would be needed to enable the Indians to commence agricultural pursuits under favorable circumstances, but supposing it probable that no part of it would be so needed, as said Indians now have over fifty thousand dollars lying idle in the United States Treasury: Therefore,

"It is directed by the President that said Railroad Company may execute their bonds with interest warrants or coupons attached, according to the forms hereto annexed, the principal of which bonds shall amount to the aggregate sum of $286,742.15, and deposit the same with Archibald Williams, of Kansas, hereby appointed to receive and receipt for the same, to be by him transmitted to the Commissioner of Indian Affairs for the use of said Indians; and also shall, in due and proper form, execute a mortgage upon one hundred thousand acres of the land contemplated in and by said treaty to aid in the construction of said railroad, the said one hundred thousand acres to be the lands designated in the letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated May 29, 1861; said mortgage to be conditioned for the full payment of said bonds, both as to interest and principal, and that on any failure to pay either when due, all right and interest of said Railroad Company in and to said mortgaged land, and also to all such of said land not mortgaged as shall not at that time be earned and patented according to said treaty, shall be forfeited, and said land again become the absolute property of the United States in trust for said Indians; and said mortgaged land to be in no event patented to said.....until said bonds, principal and interest, shall be fully paid. And upon said bonds being so made and deposited, and said mortgage being so executed and duly recorded in Leavenworth county, Kansas, all matters, so far as not necessarily varied by this arrangement, shall proceed in conformity to said treaty, as if the money had been paid by said Railroad Company

and had been invested by the President in said railroad bonds; *Provided always*, that this arrangement shall be of no effect until Archibald Williams, Judge of the United States Court for the District of Kansas, shall have endorsed a certificate upon this paper that he has carefully examined the same, and also the bonds and mortgage offered in compliance with its provisions, and has found that bonds and mortgage do in fact comply with and fulfil said provisions; and also that he has had before him the chiefs and headmen named in said treaty, as John Connor, Sar-cox-ie, Ne-con-he-con, and Rock-a-to-wha, and has fully explained to them the nature and effect of this departure from the terms of said treaty, and that they freely assented to the same.

ABRAHAM LINCOLN.

JUNE 10, 1861.

"*Form of Bond.*

($10,000.) (No. 1.)

"Know all men by these presents: That the Leavenworth, Pawnee and Western Railroad Company is held and bound to the United States, as trustee for the Delaware tribe of Indians, in the sum of ten thousand dollars, to be paid to the Commissioner of Indian Affairs, or bearer, at the office of the Assistant Treasurer of the United States, in the city of New York, in ten years from the date hereof, on the surrender of this bond, with interest on said sum from the same date, at six per cent. per annum, payable annually at the same office, on the surrender, as they severally fall due, of the annexed interest warrants. This bond being one of twenty-nine bonds for sums amounting in the aggregate to $290,560, the payment of which, with the interest warrants attached, is secured by a mortgage of even date herewith on one hundred thousand acres of the land acquired by said company, under the conditions

and provisions of the treaty between the United States and the Delaware tribe of Indians, of May 30, 1860.

"In witness whereof, the Leavenworth, Pawnee and Western Railroad Company, by Thomas Ewing, Jr., their agent, have signed this obligation, and have attached thereto their corporate seal, this 14th day of May, 1861.

[SEAL.] The Leavenworth, Pawnee and Western Railroad Company, by

THOMAS EWING, JR.,
*Their Agent.*

"*Form of Warrant.*

"The Leavenworth, Pawnee and Western Railroad Company promises to pay to the Commissioner of Indian Affairs of the United States, or bearer, on the 14th day of May, 1862, at the office of the Assistant Treasurer of the United States, in the city of New York, six hundred dollars, interest due that day on their bond No. 1.

"The Leavenworth, Pawnee and Western Railroad Company, by

THOMAS EWING, JR.,
*Their Agent.*

"*Office of Register of Deeds,*
*County of Leavenworth, State of Kansas,* } ss.

"I, W. S. Van Doren, Register of Deeds within and for the county aforesaid, do hereby certify that the within and foregoing instruments of writing were received by me for record this second day of July, A. D. 1861, at 3½ o'clock P. M., and that the same are duly recorded in Book P, for recording mortgages, at page 230, &c.

"In testimony whereof, I have hereunto set my [SEAL.] hand and official seal of office, the day and year aforesaid.

W. S. VAN DOREN,
*Register of Deeds.*

"I, Archibald Williams, Judge of the United States Court for the District of Kansas, do hereby certify that I have carefully examined the within paper signed by the President of the United States, and have also examined and approved the bonds and mortgage offered by the Leavenworth, Pawnee and Western Railroad Company in compliance with its provisions, and have accepted said bonds and mortgage, and receipted to said company for the same as Agent of the United States, and caused said mortgage to be duly recorded in the office of the Recorder of Deeds for Leavenworth county, Kansas.

"And I do further certify, that I have had before me the Chiefs and Headmen therein named, as John Connor, Sar-cox-ie, and Ne-con-he-con, and also James Connor, who was the delegate at large of said tribe in making the treaty of 1860, and read to them the said paper signed by the President, and fully explained to them the nature and effect of the proposition set forth in said paper; and that, after they had fully discussed the proposition, John Connor, in English, and James Connor, Sar-cox-ie, and Ne-con-he-con, through the said John Connor and other interpreters, declared that they understood it thoroughly, and each freely assented to the same; and that evidence has been presented to me by John Connor and other chiefs of said tribe, by which I am satisfied that Rock-a-to-wha died several months ago, and that no chief has been appointed in his place.

"Given under my hand at Leavenworth City, Kansas, this 2d day of July, 1861.

ARCHIBALD WILLIAMS."

And whereas the said treaty or agreement having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the sixth of August, one thousand eight hundred and sixty-one, advise and consent to the ratification of the same by a resolution,

and with amendments, in the words and figures following, to wit:

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES.
August 6, 1861.

"*Resolved*, (two-thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the treaty or agreement between the United States of America and the Delaware tribe of Indians, relative to certain lands of that tribe conveyed to the Leavenworth, Pawnee and Western Railroad Company, and to bonds executed to the United States by the said company for the payment of the said Indians, done the second day of July, eighteen hundred and sixty-one:

"*Provided*, That the provisions of this treaty shall not be held to apply to any lands not heretofore surveyed and appraised and not included within the limits of said reserve, nor any lands included in any fort or reservation for military purposes:

"*Provided further*, That if twenty-five miles of said railroad, from Leavenworth City westwardly, is not completed and equipped within *five* years from the ratification hereof, said company shall thereupon forfeit all right, title, and interest, legal and equitable, in and to all and every part of said lands; and if the remaining section to the western boundary of the said reserve be not completed and equipped within *three years* from the date fixed for the completion of said first section, said company shall thereupon forfeit all right, title, and interest, legal and equitable, in and to all of said lands, not heretofore earned and patented:

"*Provided further*, That in the event of a failure of the said Railroad Company to pay the annual interest accruing upon the bonds, secured as above, within thirty days after the same falls due at the end of any year, then and in such case the contract included in this treaty shall be rescinded

and shall be of no binding efficacy upon either party thereto:

"*Provided further*, That no part of said land shall be patented to said Railroad Company, until the money price for such part shall have been fully paid therefor:

"*And provided*, That this treaty shall not go into operation and be binding on them until accepted by the Indians thus amended.

"Attest: J. W. FORNEY, *Secretary.*"

And whereas William P. Dole, Commissioner of Indian Affairs, was designated by the Executive to present the treaty as above amended to the Indians, through their chiefs and headmen, for their acceptance, and to take such acceptance, if freely given, with the signatures of said Indian chiefs and headmen, and to certify his proceedings therein to the Executive; and the foregoing amendments having been fully interpreted and explained to the chiefs and headmen of the Delaware tribe aforesaid, they did thereunto, on the second day of September, one thousand eight hundred and sixty-one, give their free and voluntary assent in the words and figures following, to-wit:

"We, the undersigned, Chiefs, Councilors, and Headmen of the Delaware tribe of Indians, acting for and on behalf of said tribe, this day in full council assembled, having had read and carefully explained and interpreted to us the within and foregoing treaty or agreement between the United States of America and the Delaware tribe of Indians, concluded on the 2nd day of July, 1861, together with the within and foregoing amendments thereto, made by the Senate of the United States on the 6th day of August, 1861, do hereby accept and consent to said treaty as so amended.

"In witness whereof, we have hereunto set our hands and affixed our seals this 2d day of September, 1861.

"JOHN CONNOR,
*Head Chief*, his + mark. [L. S.]

NE-CON-HE-CON,
*Chief of the Wolf Band*, his + mark. [L. S.]

SAR-COX-IE,
*Chief of the Turtle Band*, his + mark. [L. S.]

JAMES CONNOR,
*Delegate*, his + mark. [L. S.]

CHARLES JOURNEYCAKE. [L. S.]

"Signed and sealed in presence of—

ISAAC GOLMARKE, *U. S. Int.*
F. JOHNSON.
H. B. BRANCH, } (As to Sar-cox-ie.)
W. G. COFFIN, }

"I hereby certify, that the foregoing treaty or agreement between the United States and the Delaware tribe of Indians, concluded on the 2nd day of July, 1861, together with the foregoing amendments thereto, made by the Senate of the United States on the 6th day of August, 1861, were read and fully explained by me to said Indians, except Sar-cox-ie, through Isaac Journeycake, the United States interpreter, and to Sar-cox-ie through Charles Journeycake; and that the delegate, chiefs, councillors, and headmen above named, on behalf of said tribe, this day, in council assembled, did freely accept and consent to said treaty, together with said amendments, and subscribed their names and affixed their seals thereto in my presence.

"Given under my hand this 2d September, 1861.

WM. P. DOLE,
*Commissioner of Indian Affairs.*"

Now, therefore, be it known that I, Abraham Lincoln, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the sixth of August, one thousand eight hundred and sixty-one, accept, ratify, and confirm said treaty, with the amendments as aforesaid.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

Done at the city of Washington, this fourth day of October, in the year of our Lord one thou-
[L. S.] sand eight hundred and sixty-one, and of the independence of the United States the eighty-sixth.

ABRAHAM LINCOLN.

By the President:

WILLIAM H. SEWARD, *Secretary of State.*

# OPINION OF JUDGE BREWER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

THE UNION PACIFIC RAILWAY COMPANY, *Plaintiff*,
*vs.*
HUGH SHANNON, TRUSTEE *et al.*, *Defendants*.

This is a bill to restrain defendant and his successors in office from entering upon the right-of-way of complainant, and from prosecuting any suits, civil or criminal, against the complainant or its employés on account of their quarrying stone on said right-of-way. The defendant insists that a public highway exists over said right-of-way and parallel to complainant's track, and his efforts and actions are simply to protect such public highway.

That the complainant owns a right-of-way 200 feet in width on either side of its track, has been decided by the Supreme Court of Kansas.

*Grinter v. U. P. Ry. Co.*, 23 Kas. 642.

I, as a member of that court at the time of that decision, took part therein, and have no reason to doubt its correctness or its binding force on this court. That the proceedings of the County Commissioners of Leavenworth county for the opening of a public highway at the place in question were insufficient, has also been decided by that court.

*State v. Horn*, 34 Kas. 556.

And that no public highway exists by prescription has likewise been decided.

*State v. Horn*, 35 Kas. 717.

While proceedings have been instituted before the County Commissioners to correct the record of the highway proceedings, and the County Commissioners have attempted to make such correction, yet an appeal has been taken from their order, and such appeal vacates their action and leaves the matter now as though no such action had been had.

*Blackshire v. R. R. Co.*, 13 Kas. 514.

Of course, with only these facts presented, the complainant would be entitled to protection in the peaceful enjoyment of its right-of-way. But defendant further insists upon an estoppel. I do not think this claim of an estoppel is made out. This alleged highway, the Duncan road, as it is called, runs on the north side of the railroad track, at the point in question. Years ago it crossed to the south of the track about one mile and a half east, and ran on such south side for some distance. At the instance of the Superintendent of the complainant's road this part south was changed to the north side, and in consideration thereof complainant built two bridges on the line of the new road. But all this change and this work on bridges was made more than a mile and a half distant from the land in dispute. Why complainant's action as to a piece of road a mile and a half distant should estop it from pleading the truth as to this, is not apparent. Nothing was represented expressly or impliedly as to this by complainant. Defendant had equal knowledge with complainant. He was not misled by complainant's action. He did not rely thereon and parted with nothing on the faith thereof. Scarcely a single element of estoppel can be found.

Equally immaterial is the fact testified to of complain-

ant working out its road tax on a part of this highway, or the alleged inconvenience in opening a road elsewhere. The public has had ample notice and time to open a new road. I see nothing to justify interference with complainant's rights, and a decree must go as prayed for.

D. J. BREWER,
*Circuit Judge.*

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and they obviously bring the whole case up for consideration; and as to answer them would require this court to consider the several matters thus pressed upon its attention, to pass upon questions of law not specifically propounded, and to dispose of the whole case, it is held, referring to previous decisions, that the certificate is insufficient under the statute.

THIS was a suit brought by the United States in the Circuit Court of the United States for the District of Kansas against the Union Pacific Railway Company and its receivers, as directed by the act of July 13, 1892, c. 164, 27 Stat. 120, 126, to recover certain amounts "found by the Department of the Interior to be due from said railroad company, its successors or assigns, under the last paragraph of the second article of the treaty with the Delaware Tribe of Indians of May thirtieth, eighteen hundred and sixty, and under the concluding clause of the third article of said treaty, and for damage done the said Indians in the taking and destruction of the property by said railroad company, which sums when recovered shall be used to reimburse the United States for the sum appropriated in the foregoing paragraph."

That sum was $39,675.16, of which $10,715.75 was to be paid to individual members of the Delaware Tribe for improvements on lands sold to the Leavenworth Company, and $28,959.41 was to be paid to individual members of the tribe for right of way through their allotted lands.

The first count of the petition alleged that in the year 1831, and for a long time prior thereto, the United States were the owners in fee simple of all the lands lying north of the Kansas and west of the Missouri rivers, in the then Territory of Kansas, and that by the terms of the treaty made between the United States and the Delaware Indians, proclaimed March 24, 1831, the United States conveyed and secured to that Nation, as a permanent home, a certain tract, describing it, with an outlet; that afterwards, in the year 1854, by the terms of another treaty, the Nation ceded to the United States all their right, title and interest in and to their country lying west of the State of Missouri, and situate in the fork of the Missouri and Kansas rivers, and also their right and interest in the outlet, with certain designated exceptions.

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It was further averred that articles eleven and twelve of the latter treaty provided that the country reserved for the permanent home of the Delawares might on request be surveyed and allotted; and that roads and highways laid out by authority of law should have a right of way through the reservation; "and railroad companies, when the lines of their roads necessarily pass through the said reservation, shall have the right of way, on payment of a just compensation therefor in money"; that afterwards the Delawares signified their wish that a portion of the lands reserved for their home might be divided and allotted; and thereupon, by the terms of a treaty entered into May 30, 1860, it was provided, among other things, that a portion of the reservation should be surveyed and allotted as stated, and by the last clause of article two thereof, that "the improvements of the Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building other improvements for them on the lands retained." By article three it was provided that as to the remaining lands, after the tracts in severalty and those for special objects named in the treaty had been selected and set apart, the Leavenworth, Pawnee and Western Railroad Company, a Kansas corporation, should have the prior right of purchase upon the payment into the United States Treasury, which payment should be made within six months after the quantity of said land was ascertained, in gold or silver coin, of such a sum as three commissioners, to be appointed by the Secretary of the Interior, should appraise to be the value, and providing that such value should not be placed below the value of one dollar and twenty-five cents per acre, exclusive of the cost of survey.

That, upon payment, a patent should be issued directly to the company; that the United States would accept the trust imposed on them and apply the money resulting from such disposition of the lands in the manner prescribed by the treaty of 1854; and it was "also agreed that said railroad company shall have the perpetual right of way over any por-

tion of the lands allotted to the Delawares in severalty, on the payment of a just compensation therefor, in money, to the respective parties whose lands are crossed by the line of railroad."

It was then alleged that by the terms of the treaty the United States became, and were the trustees of the Delawares for the purposes provided for therein; that the Leavenworth Company, prior to 1867, accepted the terms of the treaty and agreed to purchase the unallotted lands of the Delawares and to pay for them and the improvements thereon in accordance therewith; and that all the rights of the company in and to the lands and its liability for the lands and improvements, and all the rights and liabilities of its grantee, successor and assignee, the Union Pacific Railway Company, were fixed by the terms of said treaties, and that the Leavenworth Company, and its grantee, successor and assignee, the Union Pacific Railway Company, took the lands "subject to the conditions set forth in said treaties as to the payment therefor and as to the payment for said improvements thereon"; that the United States on October 20, 1860, appointed three commissioners to inspect and appraise the value of the land and improvements which the Leavenworth Company had become entitled to purchase, and they appraised the improvements at the value of $9534.25, and returned the appraisement, a schedule of which was made part of the petition. But at the time of that appraisement and of the purchase of the lands by the Leavenworth Company there were other improvements not included, which were afterwards appraised at the sum of $1181.50, and an itemized statement of these improvements was attached.

The United States further averred that the Leavenworth Company was unable to carry out the terms of the purchase of the lands and improvements and pay for the same as provided for in the treaty, and that afterwards a further treaty was made and entered into on or about July 2, 1861, ratified August 6, 1861, which in terms referred to the provisions for the sale of the lands and improvements in the prior treaties, by which last mentioned treaty it was provided that the

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Leavenworth Company might execute its bonds with interest coupons attached, the principal sum to be $286,742.15, and execute a mortgage on one hundred thousand acres of land, as set forth in a letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated May 29, 1861, said mortgage to be conditioned for the payment of the bonds, both principal and interest, the bonds and mortgage being executed by the company in lieu of the payment previously provided for; but no provision was made in the last mentioned treaty for any change in the time or manner of paying for said improvements, and the bonds and mortgage were executed to secure the payment of the purchase price of the lands only, exclusive of the value of the improvements, the amount whereof was not included in the mortgage.

It was also averred that through changes in the name of the Leavenworth Company, and through a consolidation by and with other railroad companies, the Union Pacific Railway Company succeeded to all the franchises, property rights and interests of the said Leavenworth Company, and became and was subject to all the liabilities of that company under and by virtue of the said several treaties, and under and by virtue of the purchase of said Delaware Indian lands and the improvements thereon; that thereafter, by the terms of the treaty entered into on the 4th day of July, 1866, which treaty was ratified on or about the 26th day of July, 1866, in article first thereof it was provided "that the United States shall secure and cause to be paid to said Indians the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee and Western Railroad Company, according to the terms of a treaty ratified August 22, 1860, and supplemental treaties, and in accordance with the conditions, restrictions and limitations thereof."

That thereby plaintiffs became and were sureties for the payment of the value of said improvements, and trustees for the Delaware Indians to collect and dispose of the money as provided therein; and that neither the Leavenworth Company nor any of its assignees or successors, nor the Union Pacific

Railway Company, nor its receivers, defendants herein, have paid for said improvements, and that they remain due and wholly unpaid by defendants.

That by an act of Congress, approved July 13, 1892, there was appropriated and paid to the Delaware Indians the sum of $10,715.75, which sum the United States paid to those Indians as sureties under the treaties and in discharge of the trust created thereby.

And plaintiffs said that by the terms of the treaties and by the acceptance thereof by the Leavenworth Company and its grantee, successor and assignee, the Union Pacific Railway Company, the latter became and was liable to plaintiffs, as sureties and trustees, for money paid out and expended on behalf of defendants for said improvements in the sum of $10,715.75, which sum, together with interest thereon from May 30, 1860, was now due and wholly unpaid.

The second count averred that by virtue of the treaties mentioned in the first count, the Leavenworth Company became entitled to a right of way across the Delaware Reservation, and across the lands subsequently allotted in severalty to the Delawares on payment of a just compensation therefor; that the United States under the treaties became trustees for the Delawares to collect and account for the amount due them for such right of way and the sureties of the railroad companies for the payment of the same: That the Leavenworth Company under these treaties laid out a right of way and constructed a railroad over and across the reservation and over and across certain parcels of land allotted in severalty to Delaware Indians, and thereby became liable to the United States as trustees for the Delawares for the damages thereby sustained by the latter; that a reasonable compensation for the right of way across the allotted lands amounted to $28,959.41, which amount was ascertained by an appraisement by a commission appointed under the treaty; that the Union Pacific Railway Company was the successor of the Leavenworth Company, and liable for the amount due the Indians for the right of way; that the amount specified was appropriated and paid the Delaware Indians by the United States under the act of

Counsel for Parties.

July 13, 1892, as sureties, and was due from the railway company.

To these counts demurrers were sustained by the Circuit Court and judgment entered in favor of defendants. The case was then carried to the Circuit Court of Appeals for the Eighth Circuit and that court certified to this court the two counts, the demurrers, and the judgment thereon, and its desire for instruction "upon the following questions and propositions of law arising upon the record in such cause, to the end that it may properly decide said cause:

"First. Upon the facts stated in the first and second counts of said petition, is the United States entitled to recover from the Union Pacific Railway Company, or the receivers thereof, the whole or any part of the sum of $10,715.75, heretofore paid by the United States to the Delaware Indians, pursuant to the act of Congress of July 13, 1892, c. 164, 27 Stat. 120, 126, for improvements upon lands sold to the Leavenworth, Pawnee and Western Railroad Company?

"Second. Upon the facts stated in the first and second counts of said petition, is the United States entitled to recover from the Union Pacific Railway Company, or the receivers thereof, the whole or any part of the sum of $28,954.41, heretofore paid by the United States to individual members of the tribe of Delaware Indians, pursuant to the provisions of the act of Congress of July 13, 1892, for and on account of right of way through allotted lands belonging to members of said tribe, which right of way was secured by the Leavenworth, Pawnee and Western Railroad Company, in accordance with the concluding clause of article 3 of a treaty concluded with the tribe of Delaware Indians on May 30, 1860?

"Third. Upon the facts stated in the first and second counts of said petition, were the demurrers thereto properly sustained?"

*Mr. Solicitor General* for plaintiffs in error.

*Mr. John F. Dillon* for defendants in error. *Mr. A. L. Williams* and *Mr. Harry Hubbard* were on his brief.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

It is settled that the certification provided for in sections five and six of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, is governed by the rules laid down in respect of certificates of division under the Revised Statutes. *Columbus Watch Company* v. *Robbins*, 148 U. S. 266; *Maynard* v. *Hecht*, 151 U. S. 324; *Graver* v. *Faurot*, 162 U. S. 435; *Cross* v. *Evans*, 167 U. S. 60.

By those rules, as repeated in these cases from prior decisions, "each question had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case; and could not embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions." *Fire Insurance Association* v. *Wickham*, 128 U. S. 426; *Dublin Township* v. *Milford Savings Institution*, 128 U. S. 510.

The questions propounded in this certificate do not present distinct points or propositions of law, clearly stated, so that each could be distinctly answered without regard to the other issues of law involved, and they obviously bring the whole case up for consideration and disposition.

Elaborate argument on behalf of the Government was made at the bar, dealing with the Delaware treaties of 1831, 1854, 1860, 1861 and 1866, and the construction of various provisions thereof; with the construction of the Pacific Railroad act of July 1, 1862, c. 120, 12 Stat. 489; and also with the legislation in relation to the incorporation of the Leavenworth, Pawnee and Western Railroad Company; its change of name; and consolidation with other railroad companies, under the name of the Union Pacific Railway Company. Laws Kansas, 1855, c. 86, p. 914; Act of July 2, 1864, c. 216, 13 Stat. 356; Resolution of March 3, 1869, 15 Stat. 348; Act of March 3, 1869, c. 127, 15 Stat. 324.

Syllabus.

Defendants in error contended that the petition was fatally defective in respect of any ground of liability for the improvements; that there was no sale of the improvements separate from the lands; that the stipulated patent carried title to the improvements with the lands; that by section two of the Pacific Railroad act of July 1, 1862, the United States granted the right of way through the reservation and undertook to extinguish the Indian title; that the grant was of a free right of way, and the United States were estopped by it from maintaining the second cause of action; that this question was *res judicata* by the judgment of the Supreme Court of Kansas in *Grinter* v. *Kansas Pacific Railway*, 23 Kansas, 642; that the line of the Kansas Pacific Company upon the right of way in question was not the line of the Leavenworth, Pawnee and Western Railroad Company or its successor, but of an independent corporation created by an act of Congress; and that even on the theory of the Government the defence of laches and limitations was available and formed a complete bar.

To answer the questions certified would require us to consider the several matters thus pressed on our attention; to pass upon questions of law not specifically propounded; and to dispose of the whole case. It follows that the certificate is insufficient under the statute.

*Certificate dismissed.*

# UNITED STATES *v.* UNION PACIFIC RAILWAY COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 133. Argued December 2, 1897. — Decided December 13, 1897.

The questions propounded in the certificate in this case do not present distinct points or propositions of law, clearly stated, so that each can be distinctly answered, without regard to the other issues of law involved,